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WITH

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Easter Term,

IN THE

TWENTY-SIXTH YEAR OF THE REIGN OF VICTORIA. 1863.

The Judges who usually sat in banco in this Term, were,—

ERLE, C. J., BYLES, J.,
WILLES, J., KEATING, J.

BAXENDALE and Others *v.* THE GREAT WESTERN RAILWAY COMPANY.

By the 7 & 8 Vict. c. iii. s. 50, the Great Western Railway Company are empowered, whenever they shall act as carriers, to charge for the carriage of goods, &c., such sums as they may think expedient, within the limits pointed out by their acts of incorporation, provided such charges are made to all persons equally; and s. 51 authorizes them to enter into such arrangements as they may think fit, with reference, amongst other things, to the collection and delivery of goods.

By a subsequent act, 10 & 11 Vict. c. cxxvi. s. 53, the company are empowered to charge for small parcels "that is to say, parcels not exceeding 500 lbs. in weight," "any sum which they think fit:"—

Held, upon the authority of Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399, Parker *v.* The Great Western Railway Company, 7 M. & G. 253, 7 Scott N. R. 835, and Baxendale *v.* The Great Western Railway Company, 5 C. B. N. S. 336,—dissentiente Erle, C. J.,—that the company are still bound to charge *equally*, and cannot lawfully demand for the carriage of parcels from station to station a sum which shall include the cost of collection and delivery, and so impose an unequal burthen on those who do not require the performance of this latter service at their hands; and that money had and received will lie to recover back sums demanded and received in excess.

THIS was an action brought for the recovery of 443*l.* 10*s.* 2*d.*, being the amount of alleged overcharges made by the defendants to the plaintiffs for the *carriage of consignments of goods under 500 lbs. weight, between April the 17th and November the 15th, 1858. [*2

The declaration contained counts for work and labour, and for money received by the defendants to the plaintiffs' use. Before plea, by consent of the parties, and by a judge's order, according to the Common Law Procedure Act, 1852, the following case was stated for the opinion of the court:—

1. The plaintiffs are common carriers, and, under the style of Pickford & Co., carry on an extensive business as such to and from different parts of England, using for this purpose, where the opportunity exists, the various lines of railway, by which they send the goods intrusted to them.

2. The defendants are the owners of "The Great Western Railway," and are incorporated by the 5 & 6 W. 4, c. cvii. This act has been amended by various acts, and, amongst others, by the 7 & 8 Vict. c. iii., and 10 & 11 Vict. c. ccxxvi., of which acts the following are the material sections:—

3. By 7 & 8 Vict. c. iii. s. 50, it is enacted "that it shall be lawful for the said Great Western Railway Company, whenever they shall act as carriers, or shall provide locomotive or steam-power and carriages for the conveyance of passengers, animals, goods, wares, merchandise, articles, matters, or things, to charge for such locomotive or steam-power and carriages such sum, not exceeding the sum (if any) limited by the said recited acts or any of them, and that either per ton, or per mile, or by bulk, measure, number, or admeasurement, or by fixed charges, as they shall think expedient: Provided always, that, in whatever way the said charges are made, they shall be made equally to all passengers, and to all persons in respect of all animals and of all goods, wares, mechandise, articles, matters, and things of a like description and quantity, and *conveyed in or propelled by a like carriage or engine passing along over the same portion of and over the same distance along the said railways, or either of them, and under the like circumstances; and no reduction or advance in any of such charges shall be made partially, either directly or indirectly, in favour of or against any particular company or person."

*3]

Section 51 provides and enacts, "that, in all cases where the said Great Western Railway Company are intrusted with the carriage or delivery of any goods, wares, merchandise, or parcels, or other matters or things, it shall be lawful for the said company to enter into such arrangements as they shall think fit with all or any of the persons to whom such goods, wares, merchandise, parcels, matters, or things, may belong, or by whom the same may be brought or sent for conveyance on the said railway, with reference to the warehousing, assortment, weighing, loading, or unloading, risk of stowage, and liability to alleged pilferage or damage, or with reference to the collection and delivery of such goods, or with reference to any other special facilities or accommodations afforded to or by the said parties in reference to such goods, wares, merchandise, parcels, matters, or things, and upon such terms and conditions as the company and such parties respectively may be willing to accept and abide by; and it shall also be lawful for the said company to enter into and make such arrangements as they may see fit with any company or person with regard to the collection or delivery of such goods, wares, mer-

chandise, parcels, matters, and things, and upon such terms and conditions as the company and the parties to such arrangements respectively may be willing to accept and abide by: Provided always, that, if it shall be considered by any such person making use of the said railway that the said company have to his prejudice accorded any [*4 *special facilities to any other persons which they are unwilling to accord to him, then and in such case it shall be lawful for the party so conceiving himself to be aggrieved to appeal to the court of quarter sessions of the county or one of the counties in which such facilities are accorded, and the said court shall have power and are hereby required on such application (of which fourteen days' notice shall be given to the company) to appoint a barrister of not less than seven years' standing, or some other competent person not interested in or connected with the railway or the party with whom any such dispute shall arise, to inquire into the matter in difference; and the person so to be appointed shall have power to call before him and to examine all persons whose evidence may be considered necessary to the inquiry, and to require the production of all books, papers, and writings which he may deem requisite or which ought to be produced for the elucidation of the matter referred to him; and, on the report of such person, it shall be lawful for the said court to order and require the said company to admit the party making such appeal to the enjoyment of the same facilities which may at the time be granted by the company to other such persons under the like circumstances, unless it shall be proved to the satisfaction of the person making such inquiry that any wilful fraud or contravention of agreement with the company has been committed by the party making such appeal; and the said company shall in all things conform to and abide by the order which may be so made by the said court upon due consideration of the circumstances under which and the extent to which such fraud or contravention may have been carried by such party."

4. By the 10 & 11 Vict. c. ccxxvi. s. 53, it is enacted, with respect to small packages and single articles of great weight, "that, notwithstanding the rate of tolls *prescribed by this act, the company [*5 may lawfully demand the tolls following, that is to say:—

"For the carriage of small parcels, that is to say, parcels not exceeding 500 lbs. weight each, the company may demand any sum which they think fit: provided always, that articles sent in large aggregate quantities, although made up of separate parcels, such as bags of sugar, coffee, meal, and the like, shall not be deemed small parcels, but such term shall apply only to single parcels in separate packages:

"For the carriage of any one boiler, cylinder, or single piece of machinery, or single piece of timber or stone, or other single article, the weight of which, including the carriage, shall exceed 4 tons, but shall not exceed 8 tons, the company may demand such sum as they think fit, not exceeding 6*d.* per ton per mile:

"For the carriage of any single piece of timber, stone, machinery, or other single article, the weight of which, with the carriage, shall exceed 8 tons, the company may demand such sum as they think fit.'

5. All the before-mentioned acts were to be considered part of the case.

6. The defendants' line of railway goes from a station at Paddington to stations at the several places mentioned in a schedule which was annexed to and was to be taken as part of this case.

7. The defendants carry on the ordinary traffic of a railway company between Paddington and their said other stations; and, in addition to this, they carry on the business of common carriers between London and other places and towns near to Paddington and their other stations, and between their several stations, whether at Paddington or elsewhere. The modes in which they carry on their business as carriers is as follows:—They receive goods,—first, at the station,—or, secondly, at receiving-houses established by them in
*6] *London and other large places,—or, thirdly, they collect them at the consignors' premises. The adoption of any of these modes is at the option of the consignor: and in the second and third cases the defendants cart the goods to the forwarding station. They deliver goods also, at the consignors' option, either at the station to which they are consigned or at the consignees' premises.

8. The defendants, when acting as carriers as hereinbefore mentioned, charge their customers a through rate in each of the cases above mentioned, which rate includes collection and delivery as well as conveyance on the line of railway; the same rate being charged whichsoever of the three modes be adopted.

9. The plaintiffs are in the habit of sending goods intrusted to them as carriers, by the defendants' railway. When they do so, they themselves collect the goods from the consignors, cart them to the station at which they deliver them to the defendants, and receive them at the several stations to which they have been consigned, whence the plaintiffs cart them to the houses of the consignees, and there deliver them.

10. The defendants were in the habit, before the change of system hereinafter mentioned, of making the following allowances or rebates off the rates charged, in the following events, that is to say,—An allowance of 1*s.* 6*d.* per ton, if the goods were brought by the customer to or received by him at a country station; and of 3*s.* 6*d.* per ton in the like events to or at the Paddington station; and these allowances were made off the accounts at the periodical settlements of them: and, where goods were sent which were under a ton weight, proportionate reduction was made by the defendants.

11. This course was continued until the 19th of April, 1858.

*7] *12. In the month of April, 1858, the defendants changed the system so adopted by them, and adopted a new system of not making any allowance or rebate off the rates charged by them for the carriage of goods under 500 lbs. weight (technically called smalls), although they were brought to or taken from their stations by their customers; and, on the 17th of April, 1858, they notified this change to the plaintiffs, in a letter as follows:—

"Great Western Railway. Goods Office,
"Paddington, April 17th, 1858.

"Messrs. Pickford & Co.

"Gentlemen.—I beg to give you notice, that, on and after Monday

next, the rule of not allowing a rebate for collection and delivery in consignments under 500 lbs. will be strictly carried out in all cases.

"T. H. STEVENS."

13. Between the 17th of April and the 15th of November, 1858, the plaintiffs delivered to the defendants at various stations of their said railway, on various days, consignments of packages, consisting in some cases of different sorts of goods, and, in others, of the same sort of goods, each package or consignment weighing under 500 lbs. Each consignment was collected and delivered by the plaintiffs to the defendants to be carried by the defendants, and was consigned to the plaintiffs at the arrival station. Each of such packages was separately addressed or marked, and was, in all cases in which the goods were of different classes, separately entered and stowed by the defendants. It was the rule of the company to weigh the packages; but, in practice, this rule was occasionally departed from.

14. On the arrival of these goods at the arrival stations, they were received by the plaintiffs, and by *them carted to the addresses [*8 of the persons for whom they were intended.

15. The defendants refused to make any allowance or rebate off their rate to the plaintiffs, although the plaintiffs had done such collection and delivery; and the defendants charged the plaintiffs the same as they charged other persons who had not collected, carted, and delivered similar goods; the company's rate between station and station being the same as between door and door.

16. Thus, for goods so delivered by the plaintiffs to the defendants at certain stations, and consigned to and received by the plaintiffs at other stations, the defendants, instead of allowing to the plaintiffs a rebate, charged the plaintiffs at the full rate, which was the defendants' rate for collection, cartage, carriage on the railway, and delivery at the houses of the consignees as aforesaid, or for carriage between station and station; to which charge the plaintiffs objected; but the defendants insisted thereon, and would not deliver the goods to the plaintiffs unless they paid to the defendants that full rate thereon; and the plaintiffs were obliged to pay and did pay it under protest.

17. The defendants during all this time charged the same rate to all their customers, including the plaintiffs, for similar goods, whether carted, carried, and delivered by the defendants or brought to or taken from their stations.

18. The whole of these cases are governed by the same principles, and the charges made and insisted upon by the defendants, and paid under protest and compulsion by the plaintiffs, as before mentioned, between the periods before mentioned, appear by the schedule, and amount in the whole to 443*l.* 10*s.* 2*d.*

19. When the defendants commenced the system complained of, the plaintiffs by their attorneys wrote *two letters to the defend- [*9 ants, of which the following are copies:—

"21st April, 1858.

"Gentlemen,—We are instructed by Messrs. Pickford & Co. to protest against a new practice which your company have now commenced, of limiting the allowance hitherto made to them (Pickford & Co.) for collection and delivery of goods which they deliver and receive

at the company's stations to goods exceeding 500 lbs. weight: and we are further instructed to give you notice, that, unless the allowance is made upon goods under that weight, as heretofore, legal proceedings will be taken against the company forthwith.

"We may add that it was decided by the Court of Exchequer, in 1842, in a case of Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399, that railway companies are bound to allow for the collection and delivery where those services are not performed by them, in order to put all customers of the railway company on an equal footing; and no distinction between goods of any particular weight has ever before been attempted to be made, and obviously cannot be supported."

"7th May, 1858.

"Gentlemen,—We are instructed by Messrs. Pickford & Co. to request the favour of an answer to our letter of the 21st ultimo, and to take legal proceedings against the company unless the illegal charges which Pickford & Co. complain of are discontinued and the excess in the company's charges is returned. We beg to inform you, therefore, that, unless the redress which they have demanded is afforded to them by Monday next, the 10th instant, legal proceedings will be commenced against the company without further delay."

*10] 20. The defendants answered the said letters through their attorneys, by a letter of which the following is a copy:—

"10th May, 1858.

"*Pickford & Co. and The Great Western Railway Company.*

"Dear Sirs,—Your letters of the 21st of April and the 7th of May, addressed to the Great Western Railway Company, we are requested to answer.

"The company consider they are justified in the charges to which you refer, though you do not accurately describe them. The case against the Grand Junction Railway Company, even if it should be sustained by the highest court, which we doubt, really does not determine the question between your clients and ours. The facts are not at all identical, besides the question of 'smalls.'"

21. The defendants during the same period allowed the plaintiffs a rebate for packages above 500 lbs. in weight, which they had received from and delivered to the plaintiffs at the same stations as are hereinbefore mentioned, and the collection, cartage, and delivery of which had been done by the plaintiffs.

22. The defendants' rates of charge are much higher in proportion for parcels of and under 112 lbs. weight than for parcels above that weight.

23. The court was to be at liberty, if it should so please, to draw conclusions of fact.

The question for the opinion of the court was,—whether the plaintiffs were entitled to recover from the defendants the said sum of 443*l.* 10*s* 2*d.* or any and what part thereof. If the court should be of opinion in the affirmative, judgment was to be entered up for the plaintiffs for 443*l.* 10*s.* 2*d.*, or some other sum, with costs of suit. If the court should be of opinion in the negative, judgment was to be entered of non pros, with costs of defence.

Schedule above referred to in the case.

	Tons.	Cwts.	Qrs.	Lbs.	Rate.	£	s.	d.
Goods from London to Bath	186	5	1	24	4s. 10d.	45	0	3
" " Bristol	344	2	0	1	"	83	3	2
" " Newbury	104	17	0	26	"	25	6	10
" " Frome	50	9	1	5	"	12	3	11
" " Reading	38	16	1	12	"	9	7	7
" " Trowbridge	25	9	0	21	"	6	3	1
" " Cirencester	8	19	3	19	"	2	3	6
" " Bridport	18	10	1	27	"	4	9	6
" " Yeovil	33	0	1	4	"	7	19	6
" country stations to Paddington	453	9	1	0	"	109	11	9
" " Bristol	183	12	3	9	3s.	27	11	0
" " Bath	16	5	0	0	"	2	8	9
" " Newbury	11	2	0	9	"	1	13	4
" " Frome	45	3	1	5	"	6	15	6
" " Reading	13	12	0	9	"	2	1	0
" " Trowbridge	29	7	1	16	"	4	8	3
" " Cirencester	12	16	2	6	"	1	18	6
" " Bridport	22	14	0	24	"	3	8	2
" " Gloucester	12	3	1	26	"	1	16	6
" " Yeovil	11	2	0	1	"	1	13	4
" " Cheltenham	10	17	2	1	"	1	12	8
" " Oxford	18	10	0	11	"	2	15	6
" " Salisbury	15	6	3	10	"	2	6	0
Goods from other than the company's stations to Bristol	10	18	3	16	1s. 6d.	0	16	5
" other than the stations to Bath	2	8	1	4	"	0	3	8
Goods to Paddington station	294	10	0	0	3s. 4d.	49	1	8
" Bristol station	137	17	3	24	1s. 6d.	10	6	10
" Reading station	157	10	0	18	"	11	16	3
" Gloucester station	48	5	3	22	"	3	12	6
" Oxford station	23	9	2	23	"	1	15	3
						443	10	2

Bovill, Q. C. (with whom was *C. Pollock*), for the plaintiffs.(a)—The facts upon which the decision of this *case will depend are shortly these:—The Great Western Railway Company are common carriers of goods. The course adopted by them for the carrying on of that branch of their business, was, either to carry from station to station, or to take upon themselves in addition the labour and expense of collecting the goods at the one terminus and delivering them to the consignees at the other. Down to the year 1858, they were in the habit of charging a sum for carriage which included the cost of col- [*12

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the plaintiffs are entitled to recover from the defendants the sum of 443*l.* 10*s.* 2*d.*, which was improperly charged by the defendants and paid under protest by the plaintiffs:

"2. That the defendants, by charging the same rate for goods which were carted by the plaintiffs to and from the stations as they did for those which were carted by the defendants, demanded and obtained the payment of unreasonable charges:

"3. That the defendants, by so charging, demanded and obtained payment of charges which were unequal and contrary to the provisions of their acts:

"4. That the cost to the defendants of carting goods to and from the stations, as well as carrying them on their line, must have exceeded the cost of carrying them on the line only; and that, to the extent of this excess, their charges have been excessive and illegal:

"5. That the mode of charging adopted by the defendants before they disallowed the rebate for collection and delivery, supports the proposition contended for by the plaintiffs."

lecting and delivering; and, where the goods were brought to or taken from the station by the parties themselves, a reduction or rebate in the charge was made by the company as a compensation. The plaintiffs, who are also common carriers, collected and delivered their own goods, and took the rebate. In 1858, however, the company, being desirous of obtaining for themselves a monopoly of the collection and delivery, intimated that they would cease to make the allow-
*13] ance, and thenceforward compelled the *plaintiffs to pay the same sum for conveyance from station to station as if the company performed the duty of collecting and delivering also. The plaintiffs remonstrated, but were ultimately compelled to submit to the extortion, and paid the money under protest. They then applied to this court for redress under the Railway Traffic Act, 17 & 18 Vict. c. 31, and in Michaelmas Term in that year they obtained an injunction: see Baxendale *v.* The Great Western Railway Company (Reading Case), 5 C. B. N. S. 336 (E. C. L. R. vol. 94). The practice was then altered: and this action is brought to recover the amount of the overcharges down to the time of that rule being made absolute. The company are bound, as well by the general law relating to common carriers as by their acts of incorporation and the general acts for the regulation of railway companies, to make reasonable charges. By the 5 & 6 W. 4, c. cvii. s. 167, this company are empowered to make "such *reasonable* charges for the conveyance of goods, &c., as they may from time to time determine upon:" and s. 175 enacts that "the aforesaid rates and tolls to be taken by virtue of this act shall at all times be charged *equally* and after the same rate," &c. Equality of charge is further enjoined by the 24th section of the 2 Vict. c. xxvii., and also by the 50th section of the 7 & 8 Vict. c. iii. The defendants will probably rely upon the 51st section of that act, which provides, that, "in all cases where the said Great Western Railway Company are intrusted with the carriage or delivery of any goods, wares, merchandise, or parcels, or other matters, or things, it shall be lawful for the said company to enter into such arrangements as they may think fit with all or any of the persons to whom such goods, wares, merchandise, parcels, matters, or things may belong, or by whom the same may be brought or sent for conveyance on the said railway, with
*14] reference *to the warehousing, assortment, loading or unloading, risk of stowage, and liability to alleged pilferage or damage, or with reference to the collection and delivery of such goods, or with reference to any other special facilities or accommodation afforded to or by the said parties in reference to such goods, wares, merchandise, parcels, matters, or things, and upon such terms and conditions as the company and such parties respectively may be willing to accept and abide by; and it shall also be lawful for the said company to enter into and make such arrangements as they may see fit with any company or person with regard to the collection or delivery of such goods, wares, merchandise, parcels, matters, and things, and upon such terms and conditions as the company and the parties to such arrangements respectively may be willing to accept and abide by: Provided always, that, if it shall be considered by any such person making use of the said railway, that the said company have to his prejudice accorded any special facilities to any other such persons

which they are unwilling to accord to him, then and in such case it shall be lawful for the party so conceiving himself to be aggrieved to appeal to the court of quarter sessions of the county or one of the counties in which such facilities are accorded; and the said court shall have power and are hereby required, on such application (of which fourteen days' notice shall be given to the company), to appoint a barrister of not less than seven years standing, or some other competent person not interested in or connected with the railway or the party with whom any such dispute shall arise, to inquire into the matter in difference; and the person so to be appointed shall have power to call before him and to examine all persons whose evidence may be considered necessary to the inquiry, and to require the production of all books, papers, and writings, which he *may deem requisite, or which ought to be produced for the elucidation of [*15 the matter referred to him; and, on the report of such person, it shall be lawful for the said court to order and require the said company to admit the party making such appeal to the enjoyment of the same facilities which may at the time be granted by the company to other persons under the like circumstances, unless it shall be proved to the satisfaction of the person making such inquiry that any wilful fraud or contravention of agreement with the company has been committed by the party making such appeal; and the said company shall in all things conform to and abide by the order which may be so made by the said court upon due consideration of the circumstances under which and the extent to which such fraud or contravention may have been carried by such party." [ERLE, C. J.—The defendants will rely on the 10 & 11 Vict. c. ccxxvi. s. 53, which provides that this company may charge "for the carriage of small parcels" (that is to say, parcels not exceeding 500 lbs. weight each) "any sum which they think fit."] That does not authorize them to make charges that shall be unequal or unreasonable. The question is by no means a new one. It first arose in the Court of Exchequer, in the year 1842, in a case of Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399. The Grand Junction Railway Company were authorized by their act of parliament, 3 & 4 W. 4, c. xxxiv. s. 156, to carry and convey upon the railway all such passengers, goods, or merchandise, as should be offered to them for that purpose, and to make such *reasonable charges* for such carriage and conveyance as they might from time to time determine on. Section 159 authorized the company also to fix the sums to be charged in respect of small parcels, not exceeding 500 lbs. weight each. By the 4 W. 4, c. iv. s. 19, they were empowered to carry *passengers and goods on other railways, and to make such [*16 reasonable charges for such carriage as they should determine on. And by another act, the 3 Vict. c. xlix. s. 26, it was enacted that the charges by the former acts authorized to be made for the carriage of passengers or goods should be at all times charged *equally* and after the same rate in respect of all passengers, goods, &c., conveyed or propelled by a like carriage or engine passing on the same portion of the line, and under the same circumstances. The company published a list of rates for the carriage of merchandise, divided into seven classes, of which the lowest was 16*s.* and the highest 60*s.* per ton; and for "boxes, bales, hampers, or other packages, when they con-

tained parcels or other packages or things under 112 lbs. weight each, directed, consigned, or intended for different persons, or for more than one person," they imposed a charge of 1*d.* per lb. weight. It was held that this last was not a *reasonable* charge in the case of a package above 500 lbs. weight, made up by a carrier and directed to one person, although containing a number of parcels under 112 lbs. weight each, consigned or directed to different persons. The company also became carriers on the London and Birmingham line, and published a list of charges for the carriage of goods from Manchester to London, among which "Manchester packs" were charged 3*s.* 3*d.* per cwt., or 65*s.* per ton. At the foot of this list was a notice that "goods were brought to the station at Camden Town without extra charge," and that there was "no charge for booking or delivery in London." The company made an agreement with Messrs. Chaplin & Horne that the latter should carry from the station at Camden Town and deliver in London all such goods carried by the railway, and for so doing should receive 10*s.* per ton out of the entire charge of 65*s.* per ton.

*17] It was held, that, under these *circumstances, the charges of 65*s.* per ton, *when made to any other persons who were ready to receive their goods at the station at Camden Town*, was both unreasonable and unequal. In delivering judgment, Parke, B., as to this point, says: "It is clearly unreasonable and unequal, to charge the same sum to a consignee who is willing to receive the goods at Camden Town, and one who requires them to be delivered at the London Docks or elsewhere in London." [ERLE, C. J.—That arose on a special case, where the court were constituted a jury. It seems to me that the principle of charging on an average of a given area (which is in effect what is done here) is a convenient mode of charging.] That view has never yet been intimated by any judge. It is impossible, it is submitted, to distinguish Pickford *v.* The Grand Junction Railway Company in principle from the present case. A similar doctrine was laid down by this court in Baxendale *v.* The North Devon Railway Company, 3 C. B. N. S. 324 (E. C. L. R. vol. 91); and strongly enforced in the judgment of Cockburn, C. J., in Baxendale *v.* The Great Western Railway Company (Reading Case), 5 C. B. N. S. 336, 349 (E. C. L. R. vol. 94). Again, in Garton *v.* The Bristol and Exeter Railway Company, 6 C. B. N. S. 639 (E. C. L. R. vol. 95); it was held that a railway company has no right to impose a charge for the conveyance of goods to or from their station, where the customer does not require such service to be performed by them. The court there treated the point as settled by the former cases.

That an action for money had and received will lie to recover back the excess which was paid under protest, is clear from Parker *v.* The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott N. R. 835; Edwards *v.* The Great Western Railway Company, 11 C. B. 588 (E. C. L. R. vol. 73); and Garton *v.* The Bristol and Exeter Railway Company, 1 Best & Smith 112 (E. C. L. R. vol.

*18] 101). It will be said that *this is not the subject of an action at all, but that the plaintiffs' only remedy was by an appeal under the 7 & 8 Vict. c. iii. s. 51. There is, however, nothing in respect of which the plaintiffs could appeal. Their complaint is that the company have illegally received from them that which they were

not entitled to receive: the money so received is clearly recoverable in this form of action, like money improperly levied under the name of a poor-rate.

M. Smith, Q. C. (with whom was *Field*), contrà.(*a*)—The question in this case depends upon the construction of the Great Western Railway Acts, and but little assistance can be derived from a reference to decisions upon other acts of parliament. Although the legislature has thought fit to place the company under restrictions as to the conveyance of large and weighty packages, it has advisedly and purposely, by the 53d section of the 10 & 11 Vict. c. ccxxvi., left them at large as to their charges for the conveyance of what are called small parcels, for which they may charge "any sum which they think fit." If the legislature had intended to limit them in the way suggested, it would have done so in terms. Neither the equality clauses in the special acts referred to nor the 90th section of the *8 & 9 Vict. c. 20, can have any effect to vary the operation of the [*19 10 & 11 Vict. c. ccxxvi., s. 53. They are pointed to tolls and to tolls only. That act was passed after the decision of Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399, and this provision may probably have been introduced for the purpose of protecting the company from the unjust consequences of that decision. The cases under the Traffic Act are altogether inapplicable: under that act, a general discretionary power is given to the court to contravene the rights of a railway company where a case of undue preference or undue prejudice is made out. The Court of Queen's Bench, in reference to this point, say, in Parker *v.* The Great Western Railway Company, 6 Ellis & B. 112 (E. C. L. R. vol. 88),—"The 50th section (of the 7 & 8 Vict. c. iii.), on which the plaintiff relies, is followed by a proviso in the 51st expressly directed to arrangements for the delivery of goods and parcels: and by it the defendants are authorized 'to enter into and make such arrangements as they may see fit with any company or person with regard to the collection or delivery of such goods, wares merchandise, parcels, matters, or things, and upon such terms and conditions as the company and the parties to such arrangements respectively may be willing to accept and abide by.' If the clause had ended here, it would have been tolerably clear that the legislature intended to keep distinct the two things, charges for conveyance, and arrangements for collection and delivery, to insist that all should be charged equally for conveyance,—a matter very easily secured when the equality required is limited to conveyance from and to the same stations,—but to leave the company open to make such arrangements as they could effect in regard to collection and delivery of parcels, in a view of the impossibility of avoiding some inequality, where they would be collected from and delivered

(*a*) The points marked for argument on the part of the defendants were as follows:—

"1. That the company are entitled, under their acts of parliament set out or referred to in this case, to make the charges complained of,—the amount charged for conveyance on the railway being within the authority given them by the said acts:

"2. That the rates complained of were charged to all persons alike; and it was open to the plaintiffs to have availed themselves of collection and delivery by the company:

"3. That no partiality or unfairness as against the plaintiffs existed:

"4. That the remedy (if any) is not by action, but by the appeal given by the act."

*20] *to consignors and consignees at distances necessarily varying in every degree. But this reasoning is much strengthened by what follows," &c. In Garton *v.* The Bristol and Exeter Railway Company, 1 Best & Smith 112 (E. C. L. R. vol. 101), which, as to this point, was in terms the same as Baxendale *v.* The Great Western Railway Company, 5 C. B. N. S. 336 (E. C. L. R. vol. 94), the point was hardly discussed: the whole sum in dispute on this head was but 2*l.* 14*s.* 9*d.* And there is no clause in the Bristol and Exeter Railway Acts like the 53d section of the 10 & 11 Vict. c. ccxxvi. This point was incidentally mentioned in the judgment of Erle, C. J., in Branley *v.* The South Eastern Railway Company, 12 C. B. N. S. 63 (E. C. L. R. vol. 104), though not necessary for the decision of the point at issue there. The plaintiffs have, therefore, failed to show any infraction by the defendants of any statute law, or any interference with any common-law right.

Bovill, Q. C., in reply.—It is a part of the general course of railway legislation that all charges shall be equal and reasonable, and there is nothing in the 10 & 11 Vict. c. ccxxvi. to relieve the defendants from the obligation thus imposed upon them. The Great Northern Railway Company's Act, 13 & 14 Vict. c. lxi., contains a clause (s. 14) almost identical in its terms with the 53d section of the 10 & 11 Vict. c. ccxxvi., and Alderson, B., in Crouch *v.* The Great Northern Railway Company, 11 Exch. 742, 752, expresses a strong opinion that the word "reasonable" must be considered as introduced into the section. It is impossible to distinguish Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399; Parker *v.* The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 90), 7 Scott N. R. 835; Parker *v.* The Great Western Railway Company, 11 C. B. 545 (E. C. L. R. vol. 73); and Edwards *v.* The Great Western *Rail- *21] way Company, 11 C. B. 588, from this case. In Baxendale *v.* The Great Western Railway Company, 5 C. B. N. S. 355 (E. C. L. R. vol. 94), Cockburn, C. J., in giving judgment, says: "It is true, no doubt, that the Company's acts give them power to impose their own rates of charge for the carriage of this description of traffic: but these acts give them no power to impose tolls or charges for collecting and delivery; and it is palpably an abuse of their powers, if, under the name of a charge for carrying on their line, they impose, otherwise than with the assent of the parties concerned, a charge for a totally different thing. Again, although the legislature has conferred the power of imposing rates of charge, it has annexed to this power the obligation of imposing such rates *equally;* and the company cannot be permitted to evade this obligation by colourably pretending that that which is in fact a charge for other things as well as for carriage, is a charge for carriage only." That was a decision on the 53d section. The whole current of the authorities is opposed to the view thrown out by the Lord Chief Justice in Branley *v.* The South Eastern Railway Company, and which does not seem to have received the assent of the other members of the court.

Cur. adv. vult.

ERLE, C. J.—This was an action to recover money alleged to have been unlawfully exacted from the plaintiffs by the defendants for the carriage of parcels. The exaction was said to be unlawful by reason

of its being unequal, that is, a greater charge to the plaintiffs than was made to other customers for things of a like description under like circumstances.

The facts were, that the defendants, in their business as carriers of parcels, offered the same service at the same price to all their customers. To all they offered for one sum to do the entirety of a carrier's duty, that is, to *receive, forward, and deliver parcels; and, in the performance of this duty, they offered to receive [*22 and deliver the parcels either at the station or within a certain area round it, at their receiving-houses, or at the address of the consignors and consignees. In this sense, the same service was at the option of all, and the same price was charged to all; the carting to and from the receiving-houses and the addresses of the customers being at the option of all who chose to have it. The plaintiffs also were carriers; and, for the performance of their duty as carriers, they, as occasion required, used the services of the defendants to carry for them, and on all those occasions they brought their parcels to the station and received them from the station, and performed the carting required for such receiving and distribution by their own carts.

Upon these facts, the plaintiffs contended that the one charge for receiving, carrying, and delivering, *must* include some amount for carting either in receiving or delivering or both, and that, as they (the plaintiffs) never had any carting done for them by the defendants, they were overcharged, and had a right to recover back such overcharge, on the ground of inequality. In support of their case, the plaintiffs cited Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399; Baxendale *v.* The Great Western Railway Company (Reading Case), 5 C. B. N. S. 336 (E. C. L. R. vol. 94); and Garton *v.* The Great Western Railway Company, 1 Best & Smith 112 (E. C. L. R. vol. 101), which cases are considered below.

The defendants contended that the charge in question was lawful, on several grounds: and I am of opinion that they can maintain their contention on each of those grounds,—first, because the 10 & 11 Vict. c. ccxxvi., ss. 51 and 53, has the effect of making the charge lawful, if it is considered to be unlawful either by the common law or by earlier statutes,—secondly, *because the charge is lawful by the common law, and not rendered unlawful by any statutes,— [*23 thirdly, because money had and received will not lie.

Before I take these grounds in their order, I will premise some general observations. First, I think the legislature by the last-mentioned statute intended to overrule some of the principles supposed to be deduced from Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399, and to free the defendants' company therefrom; and, to maintain this, I am obliged to consider that case with a freedom which my respect for the court would not permit, and which I would not use, were it not relevant to the construction of the statute, and so to the support of what I believe to be the defendants' right. Secondly, I would premise, that, as railway companies as common carriers have equal rights against and are under equal duties towards all the Queen's subjects, so all the Queen's subjects have equal rights against and are under equal duties towards railway companies as carriers, without distinction of person. This I say to exclude the notion of

the plaintiffs having any privilege by reason of their using the description of carriers by railway. They are not common carriers by railway within the meaning of the railway acts empowering carriers by railway to hire locomotive power. As between them and the defendants, they are customers having the same rights and duties as other customers. The real interest at stake here, as in a vast extent of other litigation, is, the interest derived from the intercepter of parcels from the consignors, so that the intercepter may reduce many to one by aggregation. In an action, an intercepting carrier has no greater right than any other customer, although, under the Traffic Act, 17 & 18 Vict. c. 31, if this court thinks that the process *24] of interception ought to be supported, anything that *hinders interception may be prohibited by injunction, as an undue prejudice. Thirdly, I would premise that the equal impartiality which is required from railway companies and all common carriers, relates to the way in which the lawful terms on which they choose to conduct their business are carried into execution, and have no relation to equality of benefit to be derived by each customer from those terms. The company and all common carriers may choose their terms within lawful limits, relating to their times, their prices, their classes of goods for different prices, and their mode of receiving and delivering. If the terms are not unlawful, if all equally may have the accommodation they offer, and all equally are called on to pay the same price for the same accommodation, according to the price for that accommodation as the carriers have chosen to classify it, they have violated no duty. The plaintiffs seem to assume that the company are bound to afford the same benefit to each customer, and that each customer may claim to reduce the price, if he has not so much benefit from the accommodation as some others have; and, as they have not so much benefit from delivery as some other customers have, they may call on the company to assess what would have been the cost of a delivery to them, and to deduct that cost from the charge they make to them. But the law which requires equal impartiality makes no reference to the difference in the amount of benefit received from the service, according to the circumstances of each customer.

I. I now come to the first ground of defence, that is, the right of the defendants to charge for the carriage of parcels, as declared by the 10 & 11 Vict. c. ccxxvi. ss. 51 and 53. They claim a right under that statute to charge as they think fit, subject to the general duty *25] of equal impartiality as imposed on all common carriers *by the common law, and on railway companies also by statute, but freed from the two restrictions introduced by the case of Pickford *v.* The Grand Junction Railway Company, viz. that, if the judges think that the increase of charge for the carriage of parcel goods over that of tonnage goods is unreasonable, it is unlawful, and that one charge for the one duty of receiving, carrying, and delivering is unlawful against any customer who derives less benefit from the delivery than other customers derive. The words of the 53d section of the statute are,—"for the carriage of parcels under 500 lbs. weight, the company may demand any sum which they think fit." These words grant absolute discretion. They are a form of words in frequent use, and

uniformly in the sense of granting discretional power; and they are used twice afterwards in the same section in that sense, viz. in giving power to the company to charge "such sum as they may think fit, not exceeding 6*d.* per ton per mile" for single articles weighing between 4 and 8 tons; and, for any article exceeding 8 tons, "such sum as they think fit." These words in the 10 & 11 Vict. are used in a course of legislation where the power of charging had been frequently qualified by a proviso for equality of which the 7 & 8 Vict. c. iii. ss. 50 and 51, authorizing this company "to make such charge as they may think expedient, provided the charge be made equally to all under like circumstances," is an example. The insertion of the qualification before, and the omission of it afterwards, is evidence of an intention to give a free discretional power, controlled only by the common-law duty to carry for *all* according to the terms they profess.

As to the plaintiffs' contention that the 10 & 11 Vict. c. ccxxvi. by incorporating former acts incorporated therewith the clauses for making equal charges *under like circumstances, there are two answers,—first, that the incorporation of the former acts is only "so far as they may be consistent with the clauses of the act in question;" and a grant of absolute power is inconsistent with a clause which would reduce it to a power restricted by a condition; and, secondly, the equality clauses in the former acts, if they were inserted in the 10 & 11 Vict. c. ccxxvi. would not affect the power granted by the 53d section of the latter act, as the equality clauses in the special acts relate to the powers of charging *granted by those acts*, and the equality clause in the 8 & 9 Vict. c. 20, s. 90 (the general act), relates to a power of varying charges from time to time, and restricts *that power* by the condition that it shall be exercised impartially, so as to charge equally under like circumstances. [*26

The words in the 10 & 11 Vict. c. ccxxvi. s. 53, seem to me to be clear to convey a power to charge to all such price as the company think fit. I am confirmed in this opinion by considering the consequences to which the opposed constructions of this section lead. According to the plaintiffs, the supposed right of carriers carrying by railway to intercept the profit on parcels by the process of packing, and to claim a reduction on account of the carting which they do for themselves, if it ever existed, remained unaffected by the 10 & 11 Vict. c. ccxxvi. s. 53. According to the defendants, the legislature expressed thereby an intention to release the defendants from any liability in respect of such supposed right.

In considering the consequences of each of these constructions, I do so at some length, because the interests involved are great, and the judges seem to have thought that a supposed liability to several actions of trover, in case of the loss of a packed-parcel, was the only grievance of which the companies had to *complain in respect of such packing; whereas, the real grievance is, the loss of large sums of money which are received for the carriage of parcels,—a loss constantly increasing in amount as the process of packing is better understood and the number of intercepting carriers multiplied, and a loss accompanied both with hindrance in the conduct of business and also with much litigation if the companies make any effort [*27

to save a portion of the sums due for the carriage of parcels from being intercepted.

The conditions essential for the success of a carrier's business, and the importance of their rights in respect of parcels, do not appear to me to have been sufficiently considered in the cases on the subject. Throughout the series, it has been an undisputed fact that the carriage of parcels under a given weight is the most profitable part of the business of a carrier by rapid conveyance, and was well known to be so before railways existed. This is so stated both in Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399, and in Parker *v.* The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott N. R. 835.

The nature of the business connected with the carriage of parcels, as I collect it from the cases, may be described as follows:—The company, as carriers, have to make the outlay required for the purpose of receiving, carrying, and delivering all that may be consigned for each train; and this outlay includes interest on capital and all the expense by which a train is moved. Profit begins only when the receipts exceed the outlay; and receipts are obtained by supplying the accommodation that is in demand. Receipts for tonnage-rates depend *on the weight* of things classed as tonnage goods. Receipts for parcels depend mainly *on the number* of consignors, and very slightly on the weight of consignments. The tariff brought before us lately, in Branley **v.* The South Eastern Railway Company, 12 C. B. N. S. 63 (E. C. L. R. vol. 104), is a type to exemplify my meaning. The tariff for parcels there was,—"under 7 lbs. 1*s.* 6*d.*; under 14 lbs. 2*s.*; under 28 lbs. 2*s.* 6*d.*; under 56 lbs. 3*s.*; under 112 lbs. 3*s.* 6*d.*" "Packed-parcels double the above amounts." Under this tariff, if two consignors of two parcels each under 7 lbs. consign from London to Reading at the Company's office, the company receive 3*s.*; if they consign at the plaintiff's office, he receives 3*s.*; and, if he ties the two together into one parcel, and consigns it to the company, he pays 1*s.* 6*d.* to the company, and keeps 1*s.* 6*d.* for himself. If the parcels are of the same value, the intercepters will have added double to the weight and the risk, and taken away half of the pay due to the company according to the tariff. By skilful aggregation, they may increase the weight and the risk to a very great extent, and diminish the pay to the company to a proportionate extent, and keep for themselves the difference between what the company so receives and what is due according to the tariff. [*28

The price which the carrier can get depends on the demand. If consignors demand transport without delay for small parcels, each has to pay for the accommodation that he uses, and thereby the receipts are according to the number of consignors. Under the tariff above mentioned, each consignor must pay at least 1*s.* 6*d.*, though his parcel be merely a letter; but, if he has paid that 1*s.* 6*d.* for the first ounce, he may send an addition of 56 lbs. for an addition of 6*d.* The consignors pay the same sum, whoever may be entitled to keep it: the contest for it is between the company and the intercepter: and, unless the company have power to check the process of interception, it is probable that the intercepter may by skilful aggregation bring all

consignments into tonnage-weights, and undersell the *company on parcel-rates, and keep all the parcel profit, and leave all the outlay, labour, and risk for the company. [*29

The statute here in question, as the defendants construe its terms, frees the Great Western Company from both the restrictions imposed on the Grand Junction Company by Pickford's Case, that is, from any restriction in respect of charge for parcels by s. 53, and from any restriction in respect of making arrangements for carting by s. 51. Both of these matters seem to form one interest in Baxendale *v.* The Great Western Railway Company, 5 C. B. N. S. 336 (E. C. L. R. vol. 94), and in Garton *v.* The Great Western Railway Company, 5 C. B. N. S. 669, where it is stated by the defendants that the claim for cartage is only of importance as subsidiary to the claim to pack parcels. The two claims were united in one action in Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399; and the two claims were considered together by the legislature in passing the two sections of the statute last referred to. In considering the effect of these two sections, that which relates to parcels is of primary importance: that which relates to cartage is secondary. Then, did the legislature intend to overrule the decision in Pickford's Case on both points? The anomalous reasoning which there prevailed, and the mischief which, as I think, resulted therefrom, give grounds for answering in the affirmative. The reasoning which the counsel for Messrs. Pickford adopted was anomalous, if the following view of the case is correct. It appears from the report in 10 M. & W. 399, that the first point related to the amount to be paid for a package of 8 cwt., consisting of parcels packed together therein. The company demanded either the price of each parcel or 1*d.* per lb. The plaintiff paid the latter rate (under protest), which amounted to 4*l.* The highest rate for a ton was 3*l.* The court considered that weight substantially *regulated the price of carriage, and therefore held that 4*l.* for 8 cwt. was unreasonable, because 3*l.* was the maximum for a ton. [*30 The second point related to a claim by the plaintiff to be placed on equal terms with Messrs. Chaplin & Horne, who were rival carriers and had a contract with the company to deliver within the area of delivery all goods arriving at Camden Town, for 10*s.* per ton. The public had to pay 65*s.* per ton from Manchester to London. Messrs. Chaplin & Horne were debited 65*s.* per ton, and credited 10*s.* for each ton, and so received their goods for 55*s.* per ton. Messrs. Pickford claimed to be placed on equal terms, because they received their goods at Camden Town. The court decided that they had a right to be placed on equal terms, but did not decide what those terms should be. The judgment turned on the relation in which Messrs. Pickford stood towards Chaplin & Horne as rival carriers having warehouses and tram-roads which communicated with the Camden Town terminus, and by no means decided that every customer could claim a deduction on account of cartage, if he did not benefit by it. In the report of this case, it appears that the plaintiffs' counsel relied in argument on three grounds relating to the packed parcels and one ground relating to cartage. Upon the packed-parcel question, the first of his arguments was, that the legislature did not intend to confer on railway companies the exclusive carriage of goods; therefore the com-

pany had no right to enforce the payment of the parcel-rate in respect of parcels packed together, but must allow the intercepting carriers to receive the parcel-rate and pay over only the tonnage-rate: and he referred to Lord Eldon's remark(a) that acts of this sort ought to be
*31] construed as contracts; and he further alleged that railway *companies had a monopoly of carriage. This reasoning is anomalous, because the intention of the legislature to allow competition leads only to the conclusion that competition ought to be allowed; and it is allowed, for the railway companies have no other exclusive carriage than that which the public chooses to impose by reason of its preference for steam over horses or other means of transport. All that is sent the company are bound, if possible, to carry, under peril of an action if they omit: and, if exclusiveness of carriage is to be prevented, interception of profit does not prevent it. All the work is done by the company the same, whether they keep all their earnings or not. The quantity of his business is no ground for depriving a carrier of the hire he stipulates for: still less is it a reason for granting it to another. As for the argument on monopoly, and Lord Eldon's maxim, I would pray leave to ask whether all judgments against companies founded on an imputation of monopoly are not in pari errore with judgments on the notion that companies' statutes are to be construed as contracts and not as statutes. Secondly, he argued that the power there given to the company by their statute to charge for parcels as they might think expedient, ought to be construed to apply only to parcels of great value in small compass, such as bankers' parcels, jewellery, and the like, and that, for other parcels, their power of charging must be restricted to such amounts as the judges should think reasonable. This argument rests on the gratuitous assumptions,—first, that the legislature intended what is at variance with the principles on which the charge for parcels is made,—and, secondly, that the judges have capacity for telling what rate of charge is reasonable. Thirdly, he argued, that because 3*l.* per ton was the
*32] maximum for the tonnage-rate, therefore 4*l.* for 8 cwt. of *packed parcels must be unreasonable. This argument ignores the principle on which the parcel-rate is charged. The tonnage-rate and parcel-rate have no proportionate relation: one is according to weight, and the other according to number. The price for a ton in weight of one article is no standard for comparison with the price for 100 in number of another article: a pound of silver weighs as much as a pound of gold; but the weight is no indication of the relative value of the two pieces of metal; neither is the charge for a given weight of tonnage-goods any indication of what ought to be the charge for a given weight of parcel-goods. Fourthly, as to cartage, he argued that the company had not a right to charge Messrs. Pickford so much as 10*s.* per ton for the delivery to them of their goods under the circumstances above stated, at the Camden Town Terminus, and of the relation in which Messrs. Pickford & Co. stood towards Chaplin & Horne, and of the contract of the company with the latter firm. This argument, so far as it rested on the specific facts, is not a matter for discussion now. As far as it led to a conclusion that railway companies as carriers had no right to make one charge for carriage and

(a) In Blakemore v. The Glamorganshire Canal Company, 1 Mylne & K. 162.

delivery, it is. The facts on which it was founded did not warrant any such conclusion. It may be worth while to remark more particularly on one argument used by counsel on this point. He contended against a right in the company to make any charge for cartage by horses, because they were only empowered by their statutes to charge for carriage on the line of railway. I draw attention to this, because it may relate to the 51st section of the defendants' statute, giving power to the defendants' company to make any arrangement for carting which they may choose to adopt, and so preventing any such argument being applied against a charge by them for carting.

*These were the arguments on which, as I read the case, the learned counsel for the plaintiffs succeeded. The success of these [*33 arguments is to my mind a surprise; but the consequences which have followed from the fourth point are a greater surprise, viz., because case lay for Messrs. Pickford against the company for not carrying tonnage-goods for him at the same rate as they did for Chaplin & Horne; therefore, in respect of parcel-goods, it is supposed to follow that money had and received will lie against all companies who do not take off something under the name of cartage, in favour of intercepting carriers carting their own parcels; and this though the company say they charge nothing for carting parcels and it is their interest to do so, and though it is not practicable to fix the cost of carting each parcel.

If I have correctly represented these arguments, and the consequences deduced therefrom, it is probable that the legislature had the intention which I am endeavouring to maintain, viz. to enable the defendants' company to fix their prices for the carriage of parcels as they might think fit, without being subject to any other control of the law than all other carriers are obliged to submit to. The mischief which results from this decision also makes that intention probable: and I refer to the incessant litigation of which it has been the cause, as evidence of that mischief.

A decision which accords with the best interests of the community governs undisputed in like cases; but a decision which does violence to the common sense of right becomes the subject of perpetual contest till it is overruled. The decision in Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399, so far as relates to the parcel question, has been many times contested by railway companies,—by the Great Western Railway Company, the Great Northern Railway *Company, the Eastern Counties Railway Company, and the South Eastern Railway Company: see Parker *v.* The Great [*34 Western Railway Company, 7 M. &. G. 253 (E. C. L. R. vol. 49), 7 Scott N. R. 845; Edwards *v.* The Great Western Railway Company, 11 C. B. 588 (E. C. L. R. vol. 73); Crouch *v.* The Great Northern Railway Company, 9 Exch. 556; Crouch *v.* The Great Northern Railway Company, 11 Exch. 742; Piddington *v.* The South Eastern Railway Company, 5 C. B. N. S. 111 (E. C. L. R. vol. 94). In each case this litigation has been unsuccessful to the companies, on the various grounds of fact on which the court, performing the functions of a jury, have given their verdict. But it has been constantly renewed, on a principle which probably will ultimately prevail, viz. that service must be paid for according to contract. The company profess to carry

upon certain terms; among them is the term that parcels shall be paid for at a higher rate than the same weight of tonnage-goods. All who employ them are bound to fulfil all the terms on their part to be fulfilled; and those who prevent the company from receiving the stipulated price for parcels by interception do not fulfil this term, but the contrary.

Pickford *v.* The Grand Junction Railway Company has been frequently referred to as if it laid down a general rule either in respect of packed parcels or of deduction for cartage. But it is not so: it is a decision on the facts and statutes there in question, and as there understood by the court.

The earlier decisions in the series of cases which followed Pickford *v.* The Grand Junction Railway Company by implication recognise the rights of the companies to prevent interception by other carriers, because they decide that the companies had in those cases lost the right only on account of their acquiescing in enclosures of parcels made by customers not carriers, who combined to pay to the compa-
*35] nies less than was their *due, by resorting to the process of making up two or three parcels into one, called an enclosure. These decisions are, that packed parcels are of the same description as enclosures; and, as no extra charge was made for enclosures, none could be sustained for packed parcels: see Parker *v.* The Great Western Railway Company, 7 M. & G. 262, 272, 292 (E. C. L. R. vol. 49); Parker *v.* The Great Western Railway Company, 11 C. B. 560 (E. C. L. R. vol. 73); Crouch *v.* The Great Northern Railway Company, 11 Exch. 742; Piddington *v.* The South Eastern Railway Company, 5 C. B. N. S. 111 (E. C. L. R. vol. 94). All the series of cases consist of separate verdicts founded on different sets of facts, and often on different private acts: they therefore are not binding as adjudications in other cases.

If the result of Pickford's Case was understood to be that the earnings of railway companies for carriage of parcels might be taken from them by interception, as above described, and that the companies were obliged to pay to the intercepters for the cartage incident to interception, it seems to me probable that the legislature considered that result to be an evil fit to be remedied, and intended, by passing the 10 & 11 Vict. c. ccxxvi. s. 53 (1847), to enable the Great Western Railway Company to adopt any measures which it might think fit in order to escape from that evil. If so, it follows that the one charge for receiving, carrying, and forwarding, is lawful, being expressly authorized by the section now in question.

II. But, if the defence by reason of the 10 & 11 Vict. c. ccxxvi. is found to fail, I am nevertheless of opinion that the defendants are entitled to judgment on their second ground of defence, without any aid from that statute.

The plaintiffs' case rests on the proposition that the one charge for receiving, carrying, and delivering, is unlawful against them. The defendants hold out that they will make the charge in question for
*36] doing the *duty of carrying parcels from London to Reading. The plaintiffs have employed them so to do, and have paid the price: and they now claim to recover back a part, because it was an unlawful exaction. But neither principle nor authority has been adduced to show that such a mode of charging was prohibited at com-

mon law. The notion that it is unlawful as against the plaintiffs, is founded on an erroneous construction of the statutes requiring impartial equality.

If the company's power of charging for parcels was subject by statute to the condition that they should charge equally to all under like circumstances, that condition has been performed. The defendants have charged the same sum for all parcels to be delivered within the area of delivery from the station: but, although the sum for the service is the same for all, the plaintiffs contend that the circumstances under which they pay that sum are not the same as the circumstances under which others pay it, because the benefit from the service is not so great to them as it is to some others; and they contend, in effect, that the law requiring railway companies to charge equally authorizes the judges to inquire whether the customers were benefited equally, and, if they thought not, they might order a deduction accordingly; and in that event the railway companies should be bound to analyze their charge, and apportion a part of it for each part of that duty, and to make a deduction of the sum appropriated to each part of the duty, in respect of a customer who takes no benefit from that part.

The plaintiffs refer to no principle of law in support of their contention: and Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399, and Baxendale *v.* The Great Western Railway Company, 5 C. B. N. S. 336 (E. C. L. R. vol. 94), to which they refer, are distinguished below. If there is nothing to support their contention, there *are many reasons for holding that the right so contended for does not exist. First, the duty, according to the right [*37 so claimed should not be performed. If the plaintiffs have the right to require that the charge shall be apportioned to the amount of benefit they derive from the service charged for, so has every other customer, because the plaintiffs have no privilege at law as intercepting carriers. If each customer required the charge on him to be so apportioned, the charge must be varied according to the distance of the place of delivery from the station for each customer; and it must be so varied, not only for London, but for each station where parcels are delivered. To do this with exactness is not practicable; and, if the law requires what is not practicable, the party without any default is subject to numerous actions which he cannot defend.

Again, if it is to be varied for distance, it ought also, in consistency, to be varied for weight; but the charge for parcels is made rather in respect of number than of weight, as has been before said; and an apportionment adapted for tonnage-goods is inapplicable to parcel-goods.

Also, the deduction, if made, ought to be of the cost to the defendants of delivery: but the cost of the delivery of parcels may be nothing when the apparatus necessary for the delivery of tonnage-goods, that is, mere horses and carts, are in constant daily action for the delivery of tonnage-goods within the same area as that for parcel-goods. Moreover, the claim that the amount of charge should be equalized with the amount of benefit received, conflicts with a principle of charging which is of very extensive application for all carriers, that is, the principle of average, according to which all within certain limits

must pay the same. Thus, the whole area of delivery is treated as the same distance, and the customer at the circumference pays no
*38] more than *the customer at the centre. So, for passengers,—the lightest man pays as much as the heaviest; and he who has nothing as much as he who brings 1 cwt. of luggage. Moreover, if the plaintiff can claim that a sum for cartage shall be deducted, because he has no benefit from it, the same principle would entitle him to claim that the cost of the receiving-houses should be also deducted, as he does not avail himself of them, and they are more prejudicial to him.

The plaintiffs' interest, as intercepting carriers profiting by packing parcels, is, to hinder the railway companies from receiving parcels direct from the customers, in order that they may be consigned through themselves. The railway companies have an interest in obtaining consignments of parcels direct to themselves, and to prevent interception. That interest is legitimate; and they have a right to regulate the conduct of their business for the purpose of protecting that interest. If collection and delivery of parcels is offered to all alike, gratuitously, and without any charge, for the avowed purpose of obtaining consignments direct, it is an exercise of that right for the protection of their due. The intercepting carriers may receive and deliver parcels without making any charge, and moreover may hold out inducements to obtain consignments through themselves, by underselling the companies; and they are subject neither to action nor injunction under the Traffic Act for holding out those terms to the prejudice of the business of the railway companies as carriers. So, the railway companies ought not to be liable to any action by or interference from the intercepting carriers for any accommodation offered to all customers alike, although the motive may be to prevent interception.

If the plaintiffs' case stands on no principle, neither is it supported
*39] by authority; for, the cases which they *rely on ought to be distinguished from the present. They cited Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399, so often mentioned. But there are facts in that case which distinguish it from the present. First, there the charge in question was in respect of tonnage-goods, 10*s.* per ton: here, the charge in question relates to a parcel, in respect of which neither carriage nor cartage depends on weight merely; neither can the cartage be properly apportioned in relation to each parcel. Secondly, there the line of railway ended at Camden Town, and the charge was for carriage beyond the line, and it was argued that the statutes only authorized a charge for carriage on the line, not in carts: see p. 416. Here, that argument does not apply since the 10 & 11 Vict. c. ccxxvi. s. 51, which expressly authorizes this company to make arrangements for carting. Thirdly, there, Messrs. Pickford and Messrs. Chaplin & Horne and the company stood in a relation towards each other which was peculiar to that case; and the claim of Messrs. Pickford was (p. 410) to have the same accommodation on the same terms under like circumstances as Messrs. Chaplin & Horne had, and this was refused by the company; and for this refusal the action lay. Here, the plaintiffs may have precisely the same accommodation as every other customer has; and, if they

were confined to the claim so made in Pickford's Case, they could not show that any other customer had accommodation which was refused to them. Fourthly, the supposed general rule of law, that it is unreasonable for a carrier to make one charge for carriage and delivery, must be confined to the facts of that case. The judges have no judicial perception of reasonableness as applied to the conduct of a carrier's business in general.

The plaintiffs also relied on Baxendale *v.* The Great Western Railway Company, 5 C. B. N. S. 336 (E. C. L. R. vol. 94), in *which this court decided that the defendants' mode of charging now [*40 complained of as contrary to law and a cause of action, was, under the Traffic Act, an undue prejudice to the plaintiffs' business as intercepting carriers, and a ground for an injunction. But it appears to me that the granting of such an injunction, so far from being an authority for supporting an action, has a contrary effect. The granting an injunction under the Traffic Act declares by implication that an action would not lie; for, if the complaint was a cause of action, it seems better that the parties should try their rights according to law than be subjected to special interference from that jurisdiction. Under the Traffic Act, this court may support any interest which in their discretion is thought to deserve support, and may draw any conclusion of fact from affidavits, which their reason may dictate. In an action, the court must give judgment according to law, without regard to persons or their interests; and the parties have a right to try any question of fact by a jury, and to repeat the trial as often as a new cause of action arises and they are dissatisfied with a former verdict, and to bring any question of law before a court of error. These are in my opinion rights of inestimable importance; and parties ought not to be deprived of them by applications to a single tribunal deciding at once both fact and law by reference to what that court may consider to be an undue prejudice to one of the parties. If the grievance complained of can be remedied by action, it follows that the granting of such an injunction raises a presumption that an action would not lie for the same matter. The importance of these rights to the parties is exemplified by the second argument in Baxendale *v.* The Great Western Railway Company, 5 C. B. N. S. 336 (E. C. L. R. vol. 94), and in Garton *v.* The Great Western Railway, 5 C. B. N. S. 669, in which the court *refused to consider new [*41 affidavits and to allow the grounds of the first decision to be reconsidered, and to try whether the complaint in respect of cartage was not unreal, and whether the real interest at stake was not in respect of the profit upon the carriage of parcels,—whether it should go to the company according to their tariff, or to the complainants, by interception and packing.

These are my reasons for thinking that a decision in support of a complaint under the Traffic Act has no further relevancy to the decision of an action founded on the same complaint than as it raises a presumption that the action would not lie.

The remaining authority cited for the plaintiffs was Garton *v.* The Bristol and Exeter Railway Company, 1 Best & Smith 112. In that case many points are decided. But, as to the point here in question, the court rests its judgment entirely on Pickford *v.* The Grand Junc-

tion Railway Company, which stands on peculiar facts differing from those of the present case, and on Baxendale *v.* The Great Western Railway Company, above mentioned and distinguished. Garton *v.* The British and Exeter Railway Company, therefore, is no adjudication on the facts of this case.

Upon this review, the defendants are in my opinion entitled to judgment on their second point without aid from the 10 & 11 Vict. c. ccxxvi., as the plaintiffs' case is not supported either by principle or authority.

III. The third ground of defence is, that money had and received will not lie for this supposed overcharge. The defendants have charged according to the terms they offer for all. If there is a duty to divide their charge into a sum for carriage and a sum for cartage, and to deduct from the charge to the plaintiffs the sum for cartage, and that duty has not been performed, an action would lie for breach of
*42] duty, if there *was damage; but the damages would be only the amount charged for cartage. It may have been nothing, because it is said to be the interest of the company to charge nothing, for the purpose of competing with intercepters: see the second argument in Baxendale's Case, 5 C. B. N. S. 336 (E. C. L. R. vol. 94): and, if it was nothing, there would be no damage, and the defendant would succeed. There is no precedent for maintaining money had and received where the sum in question cannot be ascertained by any of the principles upon which an uncertain amount is rendered sufficiently certain to be a debt. In Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399, the question in respect of cartage, and the question in respect of packed parcels, were raised by action on the case for refusing to carry for the plaintiff, either according to the terms held out to all customers or on the same terms as for Chaplin & Horne; and the plaintiff succeeded for unliquidated damages, assessed by agreement at 40*s.* The case is no authority for maintaining money had and received for such an alleged overcharge. In Parker *v.* The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott N. R. 835, the sums recovered were in respect of two definite overcharges beyond the terms on which the company offered to carry for other customers under like circumstances. In each case the amount was clear, if the overcharge was unlawful. Here, the plaintiffs rest on a complaint that the defendants have carried for others cheaper than for them in this sense, that such other persons have had more benefit than they have: but, if the facts show a right to recover at all, it is for unliquidated damages, not for a debt. I cite the opinion of the Court of Queen's Bench in Garton *v.* The Bristol and Exeter Railway Company, 1 Best & Smith 112 (E. C. L. R. vol. 101), to show that money had and received will not lie for inequality of charge proved only by showing that some customers
*43] *have the same benefit for less money. Indeed, it goes to prove that no action will lie, according to the opinions there expressed, unless the charge complained of was unreasonable in itself. In that case the defendants had charged the plaintiff, who was a carrier using the railway, to carry for him at Bristol for Manchester packs consigned viâ Bristol to Exeter through him, more than they charged for Manchester packs so consigned direct through their own

station: also they charged the plaintiff more for his goods to Bridgewater than they charged to inhabitants of Bridgewater. In each case the price charged to the plaintiff was reasonable in itself: but, for the purpose of increasing the earnings of their railway, the defendants had given up part of their lawful charge in these instances; and though, as to Bridgewater, the practice had been held to be an undue prejudice to the plaintiff within the Traffic Act, and the ground for an injunction, yet it was held in the action that the company in so doing were not shown to have acted unlawfully, and that money had and received would not lie for the excess paid by the plaintiff. In p. 154, Hill, J., says, in effect, "Money had and received will not lie because the railway company charged some other persons at a lower rate than yourself for the same service. Their having done so does not render the charge to you unreasonable." Crompton, J., says: "The charging another too little, is not charging you too much." Cockburn, C. J., says: "Suppose the company choose from some motive of mere favour to convey the goods of A. B. for nothing, could every person else to whom they made a charge recover it back as money had and received, unless there was proof of damage?" Here, no evidence has been offered to show that the amount charged to the plaintiff is unreasonable, beyond the evidence that some others have had more service for the same money. As to the rebate which the *defendants allowed to the plaintiffs for some time, it created no right: it was in the nature of a grant of an annuity to obtain power to regulate their carriage without interference by the plaintiffs. It is analogous to the grant of 10 per cent. which the defendants, as appeared in Parker *v.* The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott N. R. 835, allowed at one time to all who called themselves carriers: but they found the grant so perverted that they put a stop to it. The grant there created no right: neither did the rebate here. [*44

For these reasons, I think there is no ground for entertaining a claim for money had and received.

I have written at great length because I stand alone in the opinion I have formed, and I wished to give my reasons fully. I hope that my judicial Brethren will not find that I have transgressed the proper rules for respecting the adjudications of co-ordinate courts. I have explained why I have thought myself at liberty to discuss them in reference to the matters which are now before the court. In my opinion the defendants are entitled to succeed. But my brethren of this court authorize me to say that they give judgment for the plaintiffs, considering that the points relied on for the defendants have been already decided against them.

WILLIAMS, J.—On behalf of my Brothers Byles and Keating and myself, I have only to add, that, with the most profound respect for the opinion of my Lord, we feel ourselves bound by the decisions of the Court of Exchequer and of this court in Pickford *v.* The Grand Junction Railway Company, 10 M. & W. 399; Parker *v.* The Great Western Railway Company, 7 M. & G. 253 (E. C. L. R. vol. 49), 7 Scott N. R. 835; and Baxendale *v.* The Great Western Railway Company, 5 C. B. N. S. 336 (E. C. L. R. vol. 94), and therefore give judgment for the plaintiffs. Judgment for the plaintiffs.

*45] *BURNARD, Appellant; HAGGIS, Respondent. *May* 4.

An infant,—a Cambridge under-graduate,—hired a mare for a ride along the road, being expressly told that she was not fit for leaping. The mare was put to a fence, and in taking it fell upon a stake and was so injured that she died:—Held, that the infant was guilty of an actionable wrong, and therefore liable irrespective of the question of necessaries.

Whether horse-exercise is per se a necessary for an infant in that position,—*quære?*

The nature and extent of the liability of an infant or a married woman cannot be charged by suing ex delicto in respect of a claim arising on a contract: per Byles, J.

This was an appeal against a decision of the judge of the county court of Cambridge in a plaint in which William Haggis was plaintiff and John Chichester Burnard was defendant. The cause was tried on the 13th of January last before a jury summoned at the instance of the plaintiff, when a verdict was found for the plaintiff for 30*l.*, and judgment was given for that sum and costs.

The following is a copy of the particulars of the plaintiff's claim:—"This action is brought to recover the sum of 30*l.* for damages sustained by the plaintiff by reason of the defendant having on the 11th day of March, 1862, caused the death of the plaintiff's horse."

The defendant duly pleaded infancy, according to the statute and rules.

The plaintiff's attorney having opened the case as a question of contract as well as of tort, the judge asked the defendant's attorney if he objected to the particulars of the claim, as he thought they pointed rather to tort than contract; when the defendant's attorney replied that he did not object to them; and during the trial it was agreed between the plaintiff's and defendant's attorneys that the question should go to the jury whether the contract was a necessary suitable to the defendant's station in life.

Upon the trial the following facts appeared in evidence:—The plaintiff is a livery-stable keeper residing in Cambridge. The defendant is an under-graduate of Trinity College, Cambridge, whose father was formerly a surgeon, but for some years past ceased to practise his *46] profession, and was thereupon appointed to be and *is now a magistrate for the county of Somerset. The defendant was born on the 23d of May, 1842, at Crewkerne, in the county of Somerset.

On the 11th of March, 1862, about 2 o'clock p. m., the defendant, accompanied by a friend named Bonner, who was also an under-graduate of Trinity College, Cambridge, but was not examined as a witness, went into the yard of the plaintiff, to whom both of them were strangers, and the defendant stated to the plaintiff's servant, and afterwards to the plaintiff, that the defendant wanted a horse for a ride. A mare was shown to him, and he asked if she could jump. The plaintiff said he had no doubt she would, but he did not let her out for jumping or larking, and that, if he the defendant wanted a horse for jumping, plaintiff could show him a horse for that purpose. The defendant replied he did not want a horse for jumping, but merely for a ride; and he said he would have the mare, and he directed it to be sent for him to a house No. 7, Green Street, Cambridge.

The plaintiff stated that the usual charge for a ride is 7*s.* 6*d.*, and that he had charged that sum against the defendant, who however

had not paid it, and that the usual charge for a horse for jumping or larking is a guinea.

The mare was taken accordingly by the plaintiff's servant to No. 7, Green Street, with directions to take it for the defendant; and, on the servant then inquiring for the defendant, Mr. Bonner looked out of the window, and called out that the mare was for him; and immediately afterwards the defendant came up and ordered the plaintiff's servant to take the mare to the Market Hill against Rose Crescent; to which place it was taken accordingly, and there Mr. Bonner mounted it.

The plaintiff stated he did not know where either *the defendant or Mr. Bonner resided, or that Mr. Bonner rode the mare, [*47 until after it was returned to his yard injured; and that he never had any transaction with or spoke to Mr. Bonner on this or any other matter.

It appeared that the defendant resided in Rose Crescent, and that the nearest place for his mounting the mare was on the Market Hill, and that Mr. Bonner resided at No. 7, Green Street.

The defendant stated that he hired the mare, and that he did not tell the plaintiff or his servant that he wanted the mare for Mr. Bonner. The defendant also stated, that on the same day he hired a horse of John Lambert, another livery-stable keeper, and that he rode that horse, and that he directed Bonner to ride the plaintiff's mare. The plaintiff, however, did not then know that the defendant had hired a horse of Lambert; and it did not appear which horse was hired first.

The defendant and Bonner rode together from Cambridge; and the defendant stated that between Cambridge and the adjoining village of Grantchester they left the highway and rode together across the fields to the adjoining village of Burton, being a distance of about three miles, and, in doing so, they jumped their horses over several hedges and ditches, and that, as Mr. Bonner was endeavouring to jump the plaintiff's mare over a fence, it fell, and a stake entered its body.

The same day, between 4 and 5 o'clock p. m., the plaintiff's mare was led into his yard by the defendant accompanied by Mr. Bonner. The plaintiff's servant observing blood on the mare, asked what was the matter with it. The defendant said, "We have happened of an accident." The plaintiff's servant asked in what manner. The defendant replied, "In jumping the mare over a wattled fence." The plaintiff came up and defendant said to him (according to the evidence *of the plaintiff and his servant), "Passing by a wattled fence, I [*48 told my friend to jump the mare over:" but, according to the evidence of the defendant, this was denied; and the defendant was represented to have said, "A stake stood up in the middle, and the mare jumped short and came upon the stake." The plaintiff said, "How did you extricate the mare from the stake?" The defendant replied, "We had both of us to pull it out." The defendant told the plaintiff to get a veterinary surgeon to attend to the mare, saying that he would pay all the expenses. The plaintiff said, "It looks a bad case: if the mare dies, what am I to do?" The defendant answered, "If the mare dies, we will pay for it." The mare was put under the care of a veterinary surgeon named Parkhouse, who attended it at the plaintiff's request.

Six or seven days afterwards, the defendant sent the plaintiff a letter, stating that, as he the defendant should have to pay a share of the mare, if she died, he hoped the plaintiff would allow Page Wallis, a veterinary surgeon, to attend the mare; and the plaintiff thereupon placed the mare under the care of Page Wallis, the veterinary surgeon so named in the defendant's letter.

The defendant went to the plaintiff's stables several times and looked at the mare to ascertain how she was getting on; and, according to the evidence of the plaintiff, several times verbally promised the plaintiff that he would pay for the mare if she died: but this statement was denied by the defendant.

The mare died on the 23d of March, 1862, from the effects of the wound received as herein appearing, according to the evidence of the veterinary surgeons on the part of the plaintiff; but, according to the evidence of Page Wallis, veterinary surgeon on the part of the defendant, partly from another cause.

*49] *At the conclusion of the plaintiff's evidence, the defendant's attorney submitted that there was no case to go to the jury on the part of the plaintiff.

The learned judge, however, decided that there was; and, after hearing the evidence of the defendant, he put the following questions to the jury,—1. Putting aside the question of infancy, did the defendant make a contract with the plaintiff on his own account? 2. Was the defendant under the age of twenty-one years at the time of the contract? 3. Did the plaintiff know that the mare was to be ridden by Bonner? 4. What occasioned the death of the mare? 5. Whether the hiring of the mare for a ride was a necessary? 6. What amount of damage had the plaintiff sustained?

The jury answered the first and second questions in the affirmative, and the third in the negative. To the fourth, they answered that the mare died from the wound received while ridden by the friend of the defendant. To the fifth, that the hiring of the mare for a ride was a necessary suitable to the defendant's station in life. And they assessed the damage the plaintiff had sustained by the death of the mare at 30*l.*

The learned judge then asked the respective attorneys if there was any other question that ought to be put to the jury; and they replied in the negative.

In putting the fifth question to the jury, the judge, after reading the evidence and stating generally the law relating to necessaries supplied to infants, regard being had to their rank and condition of life, told them that possibly there might be cases in which a horse ought to be considered as a necessary, as, where it was required for the infant's health; but that, in the present case, there was no evidence to show that the defendant was an invalid requiring a horse for his health.

Upon the foregoing findings of the jury, the judge directed a ver-
*50] dict to be entered for the plaintiff for *30*l.* damages, and costs; and gave judgment accordingly.

The question for the opinion of this court was, whether, under the circumstances herein appearing, the plaintiff or defendant was entitled to judgment. If the court should be of opinion that the plaintiff was

not so entitled to judgment, then the court might either order a new trial on such terms as it thought fit, or might order judgment to be entered for the defendant, with or without costs of the action, and might make such order with respect to the costs of the appeal as the court might think proper.(*a*)

A. Wills, for the appellant.(*b*)—The question is whether horse exercise is a necessary for an under-graduate. [ERLE, C. J.—Rather it is, whether a seven shilling ride is so absolutely unnecessary that an infant cannot lawfully contract for it.] Whether the thing supplied be a necessary or not, is in all cases a mixed question of law and fact: Wharton *v.* Mackenzie, and Cripps *v.* Hills, 5 Q. B. 606 (E. C. L. R. vol. 48), Dav. & M. 545. One essential qualification is, that the thing shall be useful. Lord Denman, in giving judgment in the above cases, observes that the rule "cannot be more accurately laid down *than has been done by my Brother Parke in Peters *v.* Fleming, [*51 6 M. & W. 46. He says,—'It is perfectly clear, that, from the earliest time down to the present, the word *necessaries* was not confined, in its strict sense, to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, station, and degree in life in which he is; and therefore we must not take the word *necessaries* in its unqualified sense, but with the qualification above pointed out.'" And Coleridge, J., said: "As to what is the meaning of the word 'necessaries,' we have my Brother Parke's admirable judgment: to which I will make only one addition, suggested by the argument urged at the bar. It is said that we are to look at the circumstances of each defendant. True; we must do so. But the articles supplied must be necessaries, and not merely comforts or conveniences." In Brooker *v.* Scott, 11 M. & W. 67, dinners, confectionery, or fruit supplied to an infant, an under-graduate of Cambridge, having lodgings in the town, were held not to be primâ facie necessaries: and, in an action brought against him for such articles, no special circumstances being shown, the Court of Exchequer directed a nonsuit to be entered. So, in Harrison *v.* Fane, 1 Scott N. R. 287, 1 M. & G. 550 (E. C. L. R. vol. 40), in an action against an infant, an Oxford student, for the hire of horses and gigs, the jury having, contrary to the opinion of the judge, found for the plaintiff upon an issue whether they were necessaries or not, the court granted a new trial without costs. Tindal, C. J., in giving judgment, said: "In this case, the affirmative of the proposition rested upon the plaintiff: and the question is whether or not the evidence presented to the jury sufficiently made that out. It appears to me that it did not. It was, no doubt, a question for the jury, subject to

(*a*) The case was stated in this form by the learned judge himself.

(*b*) The points marked for argument on the part of the appellant were as follows:—

"1. That, the jury having found on the trial that the appellant was an infant, there was no evidence which the judge ought to have left to the jury that the hiring of the horse by the appellant was a necessary suitable to his station in life:

"2. That the judge ought thereupon to have directed the jury to find their verdict for the appellant:

"3. That there was no evidence that the death of the respondent's mare arose from the appellant's negligence:

"4. That there was no evidence of negligent or improper user of the mare."

*52] the proper control of the court. *How could a jury say that a fine upon admission to a copyhold was a necessary for which an infant could be charged? and yet the courts have so held. In many cases that might be suggested, the jury have very little knowledge of their own to guide them, and must therefore be content to take the law from the judge. I do not say that in no case can horses and gigs be necessary for an infant. But there must be some evidence to point the necessity: here there was none." And Maule, J., said: "I think it is impossible for any reasonable person to say, upon the evidence that was given at the trial, that these horses and gigs were necessary for the defendant. I doubt very much whether the jury thought so. I should rather think they decided upon an impression that the defence was an ungracious one." Then, this being an action founded on a contract, it was not competent to the plaintiff to convert it into a tort, so as to charge the infant: Jennings *v.* Randall, 8 T. R. 335. In that case the plaintiff declared that at the defendant's request he had delivered a mare to the defendant, to be moderately ridden, and that the defendant, maliciously intending, &c., wrongfully and injuriously rode the mare so that she was damaged, &c.: and it was held that the defendant might plead his infancy in bar, the action being founded on a contract. [BYLES, J.—In that case, the mare was ridden along the road: but here, she was put at a fence in defiance of the caution of the livery-stable keeper that she was not a jumper and was not let for that purpose. To use the mare as he did, was an act of tort just as distinct from the contract as if the defendant had run a knife into her and killed her. WILLES, J., referred to Wright *v.* Leonard, 11 C. B. N. S. 258 (E. C. L. R. vol. 103).] Where a livery-stable keeper lets a horse, he lets it subject to all the ordinary risks to which horses are liable.

*53] **Tozer*, Serjt., contrà.—This case is essentially distinguishable from Harrison *v.* Fane, 1 Scott N. R. 287, 1 M. & G. 550 (E. C. L. R. vol. 40). The only contract here was, that the defendant should have the mare for a ride along the road. There was no intention either that she should be taken off the road in the manner she was, or that she should be ridden by a third person.

ERLE, C. J., stopping Tozer.—The question is whether, under the circumstances stated by the judge of the county court, the plaintiff or the defendant is entitled to judgment. It appears that the defendant went to the stables of the plaintiff and contracted for the hire of a mare for a ride on the road, being told specifically that it was not let for jumping,—the charge for a horse for that purpose being a guinea, whereas the sum to be charged for a ride was only seven shillings. The defendant having obtained the mare, lent her to his friend, who so conducted himself that the animal, being forced to a leap she was not equal to, fell and was transfixed by a hedge-stake. This was an absolute wrong on the part of the defendant, for which he is unquestionably liable, quite independently of the question of necessary or no necessary.

WILLES, J.—I am of the same opinion. It appears to me that the act of riding the mare into the place where she received her death-wound was as much a trespass, notwithstanding the hiring for another purpose, as if, without any hiring at all, the defendant had gone into

a field and taken the mare out and hunted her and killed her. It was a bare trespass, not within the object and purpose of the hiring. It was not even an excess. It was doing an act towards the mare which was altogether forbidden by the owner.

BYLES, J.—I am of the same opinion. The rule is *plain, [*54
both as to married women and infants, that you cannot by suing ex delicto change the nature and extent of their liability. Here, however, the mare was let for the specific purpose of a ride along the road, and for the purpose of being ridden only by the defendant. The defendant not only allows his friend to mount, but allows him to put the mare to a fence for which he was told she was unfit. Quite independently, therefore, of the question of necessaries, the defendant is clearly responsible for the wrong done.

KEATING, J., concurred.

Judgment for the respondent, with costs.

THE MANCHESTER SOUTH JUNCTION AND ALTRINCHAM RAILWAY COMPANY, Appellants; FULLARTON, Respondent. *April* 29.

Where a railway crosses a highway on a level at a place where there is considerable traffic,—Held, that the fact of the engine-driver blowing off the steam from the mud-cocks at that spot, so as to frighten horses waiting to pass over the line, was sufficient to warrant the conclusion that the company had been guilty of actionable negligence.

THIS was an action brought by James Alexander Fullarton, the plaintiff below, against the Manchester South Junction and Altrincham Railway Company to recover damages for alleged negligence and misconduct of their servants, in discharging steam through the mud-cocks of one of the engines on their line; in consequence whereof the plaintiff's horses took fright, ran away with and broke the carriage to which they were harnessed, and injured themselves.

At the hearing before the judge of the county court of Lancashire, holden at Manchester on the 1st of January last, the following facts were proved:—

Close to the Altrincham station, the defendants' line of railway crosses on the level a turnpike-road *leading from Altrincham [*55
to Timperley and Stockport, on which there is a considerable traffic. At the crossing there are, as usual, gates, which, when any train or engine is approaching, are closed across the road on each side of the line. These gates are in charge of the railway company's servants.

On the 7th of September, 1862, a train arrived at the Altrincham station at 1.30 p. m., on its way from Bowdon to Manchester. This train drew up alongside the platform, to enable passengers to alight and get in, and, being rather long, the engine was obliged to draw up a little beyond the end of the platform, and in fact just on the level crossing.

Before the train arrived, the gates between the level crossing and the road had been closed, and they remained closed till the train left.

At the time that the train was alongside the platform and the

engine in the position described, the plaintiff's carriage, which was drawn by two thoroughbred and spirited horses, was on the turnpike-road on the Timperley side of the line, about twenty-five to thirty yards from the crossing, waiting to pass when the gates should be opened. The reason of the carriage being so near the crossing was, that the gates having been open previously to allow a cab to cross the line, they, just as the plaintiff's carriage was about to cross, were suddenly closed in consequence of the coming up of the above train.

The plaintiff's horses had often traversed the road in question, and been near the crossing when trains and engines were about, without being frightened.

On the way from Bowdon to Altrincham, the engine-driver of the train alluded to had been blowing off the water made by the condensed steam and left in the cylinders of the engine, through the mud-cocks in front of the engine. As he entered the station and passed
*56] *along the platform he discontinued to do this, and, whilst the engine was standing on the level crossing during the time the passengers were getting in and out of the train, the steam was not being blown through the mud-cocks. Immediately on the train proceeding to start on its way to Manchester, and whilst the engine was still on the level crossing, the driver whistled, and again commenced blowing off at the mud-cocks. The steam rushing out of the taps in front of the engine made a loud hissing noise, and raised a cloud of steam, which not merely enveloped the fore part of the engine, but extended itself also through the gates on the side towards the plaintiff's carriage and horses.

It was proved, that, as soon as the whistle was heard, the plaintiff's horses began to prance, the coachman, however, having them well in hand; but that, the moment the mud-cocks were opened, and the cloud of steam ejected, the horses turned right round, and went with great force and violence against a wall at the side of the road. The horses were much cut, the pole of the carriage broken, and damage done to the extent afterwards awarded.

The learned judge was satisfied, upon the proof, that, although it is necessary occasionally to relieve the cylinder by blowing off from the mud-cocks, it is quite unnecessary and unusual to do so in passing through this station or level crossing.

It was proved also that the hissing noise and cloud of steam above alluded to are the necessary consequence of blowing off at the mud-cocks, as was well known to the servants of the company in charge of the engine at the time. It was also proved, that, at the time this was done, the company's servants in charge of the carriage had seen and were aware of the plaintiff's carriage and horses being where they
*57] were at the *time, they having made a remark to that effect to a person at the station. It was proved also that the same coachman had driven the same horses for upwards of a year in the plaintiff's carriage, without any accident.

The learned judge was satisfied upon the evidence that there was no fault in the plaintiff's coachman either in being where he was at the time or in the way he managed his horses. He was also satisfied, upon the evidence, that the accident was altogether caused by the blowing off the mud-cocks at the level crossing. He came to the con-

clusion that this, under the circumstances, was negligence on the part of the company through their servants. And he ruled, that, at a level crossing like this, where there is considerable traffic, and where horses, carriages, and carts are continually passing, the company are bound to use reasonable care in the management of their trains and engines; and he found that under the circumstances they had not done so.

The counsel for the defendants objected that there was no evidence of negligence on the part of the company's servants; and that, if there were any negligence, it was not such as under the circumstances of the case would in law render the defendants liable.

The learned judge overruled the objections, and found a verdict for the plaintiff, with 40*l.* damages.

At the end of the case, the counsel for the defendants applied to the judge to reserve the case for a superior court. He declined to do so, leaving it to the defendants to exercise any power of appeal from his decision which the law gave them. He was afterwards applied to by the defendants to settle a statement of the facts, which he did as above.

T. Jones, for the appellants.—There is nothing in *the evidence to warrant the conclusion arrived at by the county court judge, that the company by their servants were guilty of negligence. It is necessary that the steam should occasionally be blown off at the mud-cocks: and it can only be conveniently done when the engine is stationary. [WILLES, J.—There was no evidence to show that it was usual or proper to do this at a level crossing; and it *is* a dangerous thing.] The company have done nothing which is inconsistent with the powers conferred upon them by their acts of parliament, or which amounts to a nuisance: The King *v.* Pease, 4 B. & Ad. 30 (E. C. L. R. vol. 24). That the blowing off the steam as was done here was unnecessary and unreasonable, is a conclusion of the learned judge which there is no evidence to warrant. [*58

Milward (with whom was *Lushington*), contrà, was not called upon.

ERLE, C. J.—Mr. Jones has failed to convince me that the county court judge, in finding that there was evidence of negligence on the part of the servants of the company, came to a wrong conclusion. It appears that the plaintiff's horses were using the road as of right, and that the company were also as of right exercising the power given them by their act, of crossing the highway: and, if there had been nothing to show that they were not exercising their rights in the ordinary way and with due and reasonable care, the company undoubtedly would not be liable for the misfortune which has happened. But I am of opinion that the evidence abundantly shows that the company by their servants exercised their right of crossing the highway in an inconvenient and improper manner. Whilst near the gate which separates the railway from the road, the driver blew off the steam from the mud-cocks *in front of the engine, so that the plaintiff's horses became enveloped therein and frightened, and so became unmanageable. It is clear that the company have not used their railway with that attention to the rights and the safety of the Queen's subjects which under the circumstances they were bound [*59

to exercise. The decision of the learned judge must therefore be affirmed.

The rest of the court concurring,

Appeal dismissed, with costs.

SCHLOSS *v.* WALTER HERIOT and Others. *April* 22.

To an action by a ship-owner against a shipper of goods to recover his proportion of average loss, the defendant pleaded that his promise was subject to a condition, viz., that the ship was seaworthy at the commencement of the voyage, and that she was not then seaworthy:—Held, a bad plea.

He further pleaded, that there never was any express promise to the effect in the declaration mentioned; that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned and arose from and in consequence of such unseaworthiness,—Held, a good plea, inasmuch as it showed that the plaintiff's actionable negligence and misconduct produced the very damage for which he sought to recover contribution from the defendants; and (probably) also on the ground of avoidance of circuity of action.

THIS was an action to recover contribution to an average loss.

The first count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendants, had taken on board a certain ship of the plaintiff called the Beatrix, at Sunderland, certain goods of the defendants, that is to say, coals, to be conveyed in and on board of that ship on a voyage from Sunderland aforesaid to Singapore, the defendants promised that they would contribute and pay their just share and proportion in respect of the said goods of any average loss that might arise or happen to the said ship or her tackle, apparel, or furniture during the said voyage: Averment, that an average loss arose and happened to the said ship, her tackle, apparel, and *furniture during the said voyage, and that the defendants' share of the said average loss in respect of the said goods amounted to the sum of 200*l.* 2*s.* 3*d.*; and that all things were done and happened, and all times elapsed, and all conditions were fulfilled, necessary to entitle the plaintiff to have the defendants pay to him the said sum of 200*l.* 2*s.* 3*d.*; yet that the defendants had not paid the same, or any part thereof, and the same still remained due and unpaid.

*60]

There was also a count for money paid and money found due on accounts stated.

Third plea, to the first count, that the defendants' promise was subject to a certain condition, to wit, that the said ship should be and was sea-worthy at the time of the commencement of the said voyage, and that the said ship was not then sea-worthy.

Fourth plea, to the first count, that there never was any express promise by the defendants to the effect in the said first count mentioned; and that the said ship was not sea-worthy at the time of the commencement of the said voyage, but was then unseaworthy; and that the said average loss in the declaration mentioned was caused and occasioned and arose and happened from and in consequence of such unseaworthiness as aforesaid.

Second replication to the third plea,—that there never was any express condition such as in that plea is mentioned, nor did any facts or circumstances ever exist from which any such condition could be

implied other than the carriage of the said goods of the defendants in the said ship of the plaintiff.

Demurrer to the fourth plea, the ground of demurrer stated in the margin being "that the fact of the ship being unseaworthy is no answer to the plaintiff's claim." Joinder.

Demurrer to the second replication to the third plea, *the ground of demurrer stated in the margin being, "that, from the [*61 carriage of the goods of the defendants in the ship of the plaintiff for freight, such condition in restriction of the defendants' liability for general average can be and is to be implied." Joinder.

C. Pollock, for the plaintiff.(*a*)—The third plea raises the question whether, where general average is claimed, there is an implied condition that the ship shall be seaworthy at the commencement of the voyage. It is submitted that there is not. In Abbott on Shipping, Part IV. Ch. 5, treating of the duties of masters and owners, it is said: "The first duty is, to provide a vessel tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage; for, if the merchant suffer loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, and of delay or loss of market resulting from it, he will be entitled to a recompense,"—by cross-action. There is no allegation in the plea that the ship was *unseaworthy to the knowledge of the owner. [*62 In Tarrabochia *v.* Hickie, 1 Hurlst. & N. 183, it was held that the stipulations in a charter-party that the vessel, being tight, staunch, and strong, shall sail with all convenient speed, are not conditions precedent to the charterer's obligation to load, unless by the breach of such stipulations the object of the voyage is wholly frustrated. [WILLES, J.—Do you say there is no warranty of seaworthiness?] It may be that unseaworthiness would give the shipper a ground of action for any damage he may have sustained therefrom: but seaworthiness is not a condition. Besides, there is no allegation here that there was any charter-party. The fourth plea is entirely new, and is clearly bad on principle. It admits an average loss, and that the loss arose immediately from the act of the master, and was occasioned by a peril of the sea. These are essential. Birkley *v.* Presgrave, 1 East 220, is an authority to show that an action lies by a shipowner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship, for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. In 3 Kent's Commentaries 232, it is said: "By the Rhodian law, as cited in the Pandects

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

As to the demurrer to the replication to the third plea—"1. That the action well lies for general average:

"2. That the fact that a ship is unseaworthy when she leaves her port of loading, is, in the absence of any express contract, no answer to a claim for general average arising during the voyage:

"3. That it is consistent with the statements contained in the third plea and the replication that the general average arose from a cause other than the unseaworthiness of the ship."

As to the demurrer to the fourth plea,—"4. That the unseaworthiness of a ship cannot be the proximate cause of general average, which must be voluntarily incurred:

"5. That unseaworthiness is at most the ground of a cross-action, and that, as the issue in the two actions would not be identical, nor would the measure of damages be the same, the defence cannot be maintained upon the ground of avoiding circuity of action."

(Dig. 14, 2, 1), if goods were thrown overboard, in a case of extreme peril, to lighten and save the ship, the loss, being incurred for the common benefit, was to be made good by the contribution of all. The goods must not be swept away by the violence of the waves, for then the loss falls entirely upon the merchant or his insurer, but they must be intentionally sacrificed by the mind and agency of man, for the safety of the ship and the residue of the cargo. The jettison must be made for sufficient cause, and not from groundless timidity. It
*63] must be made in a case of extremity, *when the ship is in danger of perishing by the fury of a storm, or is labouring upon rocks or shallows, or is closely pursued by pirates or enemies; and then, if the ship and the residue of the cargo be saved by means of the sacrifice, nothing can be more reasonable than that the property saved should bear its proportion of the loss. The doctrine of general average is one of those rules of the marine law which is built upon the plainest principles of justice; and it has, accordingly, recommended itself to the notice and adoption of all the commercial nations of the world." It may be contended that this plea is an informal traverse of the alleged average loss, or that it is good as avoiding circuity of action. There is, however, nothing to show that the issue in an action by the owner of the goods would be the same, or that the measure of damages must necessarily be the same, so as to bring the case within that principle: Charles *v.* Altin, 15 C. B. 46 (E. C. L. R. vol. 80); Alston *v.* Herring, 11 Exch. 822. It is impossible to distinguish those cases from the present. To make a plea good on the ground of avoidance of circuity of action, it must amount almost to a case of set-off.

*64] *T. Jones*, contrà,(a) did not attempt to sustain the *third plea; but he insisted that the fourth plea was a good answer, inasmuch as it showed that the loss was occasioned by the actionable negligence and misconduct of the plaintiff himself.

ERLE, C. J.—The third plea is clearly bad: there is no such condition as therein alleged. The fourth plea I think is a good one. It shows that the plaintiff was himself the cause of the loss,—that his actionable negligence and misconduct produced the very damage for which he seeks to recover contribution from the defendants. Further, I am of opinion, that, if necessary, the plea is sustainable on the ground that the defendants would be entitled in a cross-action to recover back the whole sum claimed by the plaintiff in this action.

WILLES, J., and KEATING, J., concurring,

Judgment for the plaintiff on the third plea.

Judgment for the defendants on the fourth plea.

(a) The points marked for arguments on the part of the defendants were as follows:—

"1. That, inasmuch as where a ship is unseaworthy at the commencement of the voyage, the owner of the cargo would be precluded from recovering against his insurers in respect of a contribution to a general average loss, and as the condition of the ship as to seaworthiness at the commencement of the voyage is a matter within the ship-owner's knowledge and control, it is an implied condition precedent to the liability of the owner of the cargo to the owner of the ship for contribution to general average, that the ship should have been seaworthy at the commencement of the voyage:

"2. That, at all events, where the loss has arisen from the unseaworthiness of the ship at the commencement of the voyage, the owner of the ship can have no claim against the owner of the cargo for contribution towards such loss, the same having been caused by his (the ship-owner's) own act or default."

*HOPKINS *v.* HITCHCOCK. *April* 20. [*65

The defendant received an order from a correspondent at Bremen to purchase for him bar iron of a description known there as S. & H. crown iron. Upon inquiry, he found that the firm of Snowden & Hopkins, whose mark that was, had ceased to exist, and had been succeeded by a firm of Hopkins & Co. (the plaintiff): and he accordingly, through a broker, bought of the plaintiff sixty-seven tons of iron, which was described in the bought and sold notes as "S. & H. (crown) common bars." The iron when tendered was found to bear the mark of the new firm "H. & Co.," with a crown, and was rejected by the defendant.

In an action for refusing to accept the iron, the jury found that the mark "S. & H." was not a material part of the bargain, and that the article tendered was substantially what the defendant bargained for:—

Held, that, construing the contract by the surrounding circumstances, the mark S. & H. might, if necessary, be rejected as falsa demonstratio, and that the contract was complied with by the tender of iron marked "H. & Co."

THIS was an action for not accepting a quantity of iron pursuant to contract.(*a*)

The cause was tried before Erle, C. J., at the sittings at Westminster, after last Michaelmas Term. The facts which appeared in evidence were as follows:—A firm of Snowden & Hopkins had for many years carried on business as iron manufacturers at Middlesborough, in Yorkshire, using for their mark the letters S. & H., with a crown; and their iron so marked had acquired a high character. In 1860, Snowden retired, and the business continued to be carried on by the plaintiff under the style and firm of Hopkins & Co., and the mark of the new firm was accordingly changed to H. & Co., with a crown. The defendant, a merchant in London, had a correspondent at Bremen named Voghler, who had directed him to purchase for him a quantity of iron of the mark S. & H., with a crown. In August, 1862, a broker named Balls called upon Taylor, the agent of the plaintiffs in London, and asked him the price of iron of that mark, telling him that a friend of his wanted some. Taylor informed Balls of the change in the firm, and gave him a book of Hopkins & Co.'s prices, which contained the following intimation,—"Every description of iron *manufactured at these works is stamped 'H. & Co. (crown) [*66
com.,' or 'H. & Co. (crown) best,' &c., according to quality." Balls took the book away with him, and communicated to the defendant the information which he had received. The defendant afterwards agreed with Taylor for the purchase of sixty-seven tons of iron bars of Hopkins & Co.'s manufacture, and Taylor handed him the following bought-note:—

"No. 1163. "August 25th, 1862.

"Bought for account of George Hitchcock of our principals sixty-seven tons, S. & H. (crown) common bars, as per specification, herewith, at 6*l.* 10*s.* per ton, &c.

TREGELLES & TAYLOR, commission agents."

The stipulated quantity of iron was shipped in September, and duly arrived at Hull. Finding the iron very much rusted, the defendant declined to accept it, saying that Voghler had before rejected iron on that ground, and he (the defendant) would not incur the risk of

(*a*) The declaration originally consisted of counts for goods bargained and sold, and the money counts, to which there was a plea of never indebted. It was altered at the trial to a declaration as above stated.

forwarding it in that state. The bars having been landed for inspection, it was found that they were all branded "H. & Co.," with a crown, and the defendant thereupon entirely repudiated it, as not being the article he contracted for. A witness called on the part of the plaintiff stated that the mark which indicated the quality was the crown, and that the letters were immaterial. On the other hand, evidence was called on the part of the defendant to prove that in a foreign market the brand or mark upon iron was most material.

His lordship left it to the jury to say whether the brand "S. & H." was material to the bargain, and whether the defendant got substantially what he bargained for.

*67] The jury found for the plaintiff, damages 434*l.*; and *leave was reserved to the defendant to move to enter the verdict for him, on the ground that the iron supplied by the plaintiff was not a compliance with the terms of the contract.

Cleasby, Q. C., in Hilary Term last, obtained a rule nisi accordingly. He submitted that it was a condition of the bargain that the iron should be marked S. & H., with a crown. [ERLE, C. J., observed that he was surprised at the verdict, but at the same time that the jury had well considered the matter, and deliberately came to the conclusion they did.]

Shee, Serjt., and *Needham*, now showed cause.—The iron tendered was the very iron contracted for,—iron manufactured by the successors of the firm of Snowden & Hopkins. The change in the brand, which the jury, with abundant evidence to justify them, found to be immaterial, was occasioned solely by the change in the name of the firm by which the business was continued. The objection was a mere evasive one. [WILLES, J.—According to the evidence, the S. & H. may be rejected as falsa demonstratio. The words, "our principals" sufficiently identify the firm.] The order was for "S. & H. bars." Now S. & H. iron is a sort of commercial description of the metal. What satisfies it is a matter of fact, to be decided, like any other fact, by the jury.(*a*) Balls, the defendant's agent, when inquiring for S. & H. iron, was told that those letters were no longer used, and that the mark for that particular iron was now "H. & Co." with a crown. [ERLE, C. J.—Balls was not an agent: he merely made an inquiry.] Powell *v.* Horton, 3 Scott 110, 2 N. C. 658, is very like this case. There, the defendant contracted to sell to the plaintiff "Scott & Co., *68] 75 barrels mess *pork, at 53*s.* per barrel:" at the trial it was proved that mess pork cured by Scott & Co. obtained in the market a higher price by 2*s.* 6*d.* per barrel than pork cured by any other house; and witnesses (connected with the trade) were allowed to state their construction of the contract. It was held, that, by the terms of the contract, the pork was expressly warranted to be pork *cured* by Scott & Co., and not merely *consigned* by that firm; and that the evidence to explain the meaning of the contract was properly received. Here, the defendant was dealing with Hopkins & Co.: the contract was for iron to be manufactured by them: and therefore the jury were well warranted in finding the brand "S. & H." to be immaterial. In Power *v.* Barham, 4 Ad. & E. 473 (E. C. L. R. vol. 31), 6 N. & M. 63, where the invoice described the articles bought as "Views

(*a*) See Josling *v.* Kingsford, 13 C. B. N. S. 447 (E. C. L. R. vol. 106).

in Venice, Canaletto," but the buyer had an opportunity of inspecting and passing his own judgment upon the pictures, the court did not take upon itself to say whether this amounted to a representation that the pictures were by Canaletti, or a mere description: but it was held to be a question for the jury. So, in Stockdale *v.* Dunlop, 6 M. & W. 224, evidence was admitted to show that the term "oil *to arrive* by the Maria," was a well-understood mercantile term, and that, if the oil did not arrive by that particular vessel, the purchaser had no right to it. Nichol *v.* Godts, 10 Exch. 191, may possibly be relied on by the defendant: but there the article tendered, though equal in quality to the sample, was not the article contracted for at all; whereas, here, the thing tendered is the very thing which was meant to be bought and sold, the very article which the defendant bargained for.

Cleasby, Q. C., in support of his rule.—It is well known that iron is usually sold by the brand. *Crawshay *v.* Thompson, 4 Scott N. R. 562, 4 M. & G. 357 (E. C. L. R. vol. 43), Rodgers *v.* Nowill, 5 C. B. 110 (E. C. L. R. vol. 57), and numerous other cases, show the extreme importance of the brand or mark. The contract here is for a sale by the brand. The defendant bought and intended to buy S. & H. bars, and nothing else. His orders from his correspondent abroad were to buy S. & H. iron. Nothing was said about the crown either in the contract or in the specification. It was left to the jury to say whether the brand "S. & H." was material. They found that it was not: and certainly it was not material in one sense: but, in the sense of its indicating the thing contracted for, it was most material. [WILLES, J.—Do you contend, that, in order to satisfy the terms of the contract, the iron must be manufactured by Snowden & Hopkins?] No: but it must be such iron as the brand indicates. [WILLES, J.—Suppose the note had been, "for account of our principals, Hopkins & Co., sixty-seven tons S. & H. iron," would the "S. & H." have been falsa demonstratio, or would the contract be void?] The contract would be void. [*69

ERLE, C. J.—I am of opinion that this rule should be discharged. The action is brought by the vendor of certain bars of iron against the purchaser, for not accepting and paying for them. It was contended on the part of the purchaser that the iron tendered was not according to contract. The article bought is described in the bought-note thus,—"sixty-seven tons S. & H. (crown) common bars, as per specification herewith;" and the specification describes it in a similar manner. The whole question turns upon the letters "S. & H." The bars tendered were bars marked "H. & Co.," and not "S. & H." After having objected to them on account of rust, the plaintiff insisted at last that the brand was an essential part of the contract, *and that he was not bound to accept bars marked otherwise than "S. & H." If I am to construe the contract according to the surrounding circumstances, the conclusion I come to is, that this is not a contract for the brand of S. & H. The contract arose in this manner. A merchant at Bremen was desirous of being supplied with iron marked "S. & H.," a mark which he was acquainted with. Inquiry was made by one Balls on behalf of the defendant, when Balls found that the firm of Snowden & Hopkins no longer existed, Snowden having retired, and that the name of the new firm was Hopkins & Co., [*70

and that consequently the mark on the iron manufactured by them was changed to "H. & Co.," with a crown. Being informed of this by Balls, the defendant makes no objection, but applies to the new firm for S. & H. iron, and it is so described in the bought-note. In addition to that, there is evidence, that, as between seller and buyer, that which indicates the quality of the article is the crown; the initials are immaterial. It is clear, upon the plaintiff's case, that the fair inference is that the defendant intended to purchase of Hopkins & Co. iron of the same quality as had formerly been made by Snowden & Hopkins, and marked with their initials. When we come to the defendant's case, we find evidence that "S. & H." was a well-known brand, and important to the purchaser, and therefore it was insisted that it was of the essence of the contract that the iron should be marked with those initials. The jury, however, have found that the "S. & H." was not material. I think the balance of the evidence was in favour of the plaintiff, and that the verdict ought to stand. I am quite aware of the extreme importance in all contracts of words descriptive of the thing sold: they may, and frequently do, amount to a condition, (a) and may be most essential. It is upon *the construction of the words of this contract that I rely. I think it is not a contract for iron of a particular brand, but for iron of a known quality, and that the plaintiff tendered the article for which the defendant contracted.

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WILLES, J.—I am of the same opinion. It is quite familiar knowledge, that a particular brand may be of value in the market, and especially in a foreign market, although it may not in reality affect the intrinsic value of the article. It may be an indication that the article was made by one who has acquired remarkable skill and a character for integrity, and so serve as a guarantee for its excellence; or it may give the article a capricious value, as, where the article is intended to be sold in a place where buyers are accustomed to a particular and well-known mark, such is the inveteracy of habit, that in many cases they will have none other. There can be no doubt, therefore, that, if a person stipulates to have an article marked or branded with a particular mark, whether it thereby acquires a real or merely a capricious value, he does not get what he bargains for if the article is without that mark. But, when it is not clear upon the face of the contract whether or not the buyer intends to stipulate for the identical mark, it is not immaterial to inquire in the particular case whether or not the brand or mark can have any real value. Here, the jury have found that the brand is of no value, either with reference to the character of the maker or to the intention of the buyer to sell it at a place where the particular brand had given a fancy price to the article. Taking, then, all the surrounding circumstances, and looking at the terms of the contract, there is no express reference to any particular brand, nor is there anything to induce us to say that it is impliedly a part of the contract that *the iron should have a particular brand. We have first to ascertain by the contract who are the persons the defendant is contracting with. That is ascertained by the use of the words "our principals." These are Hopkins & Co., whose proper brand no doubt would be H. & Co.

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(a) See Bannerman v. White, 10 C. B. N. S. 844 (E. C. L. R. vol. 100).

Then, what is meant by S. & H.? Those letters are used for the purpose of indicating that the quality of the iron is to be such as the firm whose initials they were, and who had been succeeded by Hopkins & Co., had been accustomed to make. Upon the whole, the just construction of the contract appears to me to be, that Hopkins & Co. shall supply iron of the quality formerly supplied by Snowden & Hopkins, without reference to the particular mark. If that be not the true meaning of the letters S. & H., then I think we might reject them as being falsa demonstratio. I do not, however, think that necessary. Those letters, with the context, in my opinion exhaust themselves upon a description of the quality of the iron. Mr. Cleasby was obliged to admit that his construction would make the contract void. But we are bound to construe it so as to make it good, if the words will reasonably admit of that construction.

BYLES, J.—I am of the same opinion. I am quite sensible of the artificial value attached to brands: and, if the jury had found that S. & H. was a well-known brand, which would pass the article in the market irrespective of quality, possibly the defendant's argument might prevail. But here the jury have expressly found that the brand has no artificial value at all. The contract is not for iron of such a brand, but for "S. & H. crown common bars, as per specification." I cannot help thinking that the mention of the brand is no part of the warranty, but simply matter of description, and perhaps not inaccuracy of description. It *may mean iron the produce [*73
of the particular iron-works, and of crown quality. Suppose the article had been present at the time of the contract, and had been sold as S. & H. crown common bars, and it turned out that they were branded or marked "H. & Co.," with a crown. There the maxim Præsentia corporis tollit errorem nominis would undoubtedly have applied. I do not mean to say that this was not a matter that was well worthy of consideration. But I think that at the most it amounts to an erroneous description, though I doubt whether it even amounts to that.

KEATING, J.—I am of the same opinion. I must confess that during the course of the argument I entertained some doubt whether the insertion of the letters S. & H. did not amount to a stipulation that the iron should bear that particular brand. Purchasers have an undoubted right so to stipulate if they think proper. But, looking more closely at the contract and at the surrounding circumstances, I entirely agree with my Lord and my two learned Brothers that it is a contract for iron of a particular quality, and not for iron of the particular brand. Rule discharged.

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*CHOWN and Another *v.* PARROT and Another. *May* 4. [*74

An attorney retained to defend an action is not guilty of actionable negligence if he enters into a compromise without the consent of his client, provided he acts bonâ fide and with reasonable care and skill, and the compromise is for the benefit of the client, and is not made in defiance of his express prohibition.

THIS was an action against the defendants, attorneys, for alleged negligence.

The second count of the declaration stated that the plaintiffs retained the defendants, as and being attorneys of the Court of Exchequer, to conduct the defence of the plaintiffs in an action of ejectment depending in that court at the suit of William Claridge Harding and John Sheldon against the now plaintiffs, for reward to the defendants; and that the defendants, as and being such attorneys, accepted the said retainer; yet that the defendants conducted the said defence negligently and unskilfully as such attorneys, whereby judgment was signed against the now plaintiffs in the said action, and the said William Claridge Harding and John Sheldon obtained possession of certain lands and premises of the now plaintiffs, and recovered costs in the said action against the now plaintiffs, and the plaintiffs thereby also incurred other costs and expenses: Claim, 1000*l.*

Second plea,—to the second count,—that the said grievances in that count mentioned were grievances alleged to have been sustained by the plaintiffs by and in consequence of the defendants, as such attorneys for the now plaintiffs in the said action as in that count mentioned, having by a certain writing signed by the now defendants as such attorneys for the now plaintiffs in the said action, consented, as in fact under the advice of counsel for the now plaintiffs, to whom all the facts were communicated, they did consent, to a certain order being made in the said action (by the said consent of the now defendants as
*75] the attorneys for the now plaintiffs in the said action, *and by the consent of the attorneys of the said plaintiffs in the said action) by Sir Samuel Martin, Knt., one of the barons of the said Court of Exchequer, and having as such attorneys for the now plaintiffs in the said action procured and accepted due service in the said action of the said order, which order was and is in the words and figures following, that is to say,—"Upon hearing the attorneys or agents on both sides, and by consent, I do order that the proceedings in this action be stayed, the plaintiffs being at liberty to sign judgment in ejectment for the lands and premises in respect of which the defendants have limited their defence, with costs to be taxed and paid by the defendants to the plaintiffs; the plaintiffs to be at liberty to take possession forthwith, without executing a writ of possession; the plaintiffs consenting and agreeing to grant or obtain a lease to the defendants of the piece of ground part of Long Close, now occupied by them as a garden, and enclosed by a quick-fence, and protected by a dead fence, for a term of twenty-one years, at a rent of 20*s.* a year; such garden being within the parish of West Wycombe, and the boundary of the said parish; the lease to contain the usual covenants, and be prepared at the expense of the defendants, who are to execute a counterpart, and not to be at liberty to inquire into the lessors' title. Dated the 14th day of July, 1862;" That, at the time when they the defendants, as such attorneys for the now plaintiffs in the said action so consented to the said order being so made as aforesaid, and so procured and accepted the service of the said order in the said action as aforesaid, they the defendants, as such attorneys for the now plaintiffs in the said action, were not then bound by or under any orders or directions whatsoever from the now plaintiffs not to compromise the
*76] said action, and were then, as such attorneys for the now plaintiffs in *the said action, and under and by virtue of the said retainer

in the said second count mentioned, at full and perfect liberty to conduct the said action in such manner as to them the said defendants, as such attorneys for the now plaintiffs as aforesaid, should, in the exercise of due and reasonable skill and care in that behalf, appear to be, and be, most advantageous and beneficial to the interests of the now plaintiffs with reference to the said action: That they, the defendants, as such attorneys as aforesaid, in so consenting to the said order being so made as aforesaid, and in so procuring and accepting due service of the said order in the said action as aforesaid, acted in good faith towards the now plaintiffs, and in so doing exercised due and reasonable skill and care in that behalf; and that it then appeared to them, the defendants, that, by so consenting as aforesaid, and by so procuring and accepting due service of the said order as aforesaid, they the defendants were then acting, and they the defendants were then acting, in the manner most advantageous and beneficial to the interests of the now plaintiffs with reference to the said action: That, afterwards, and before the commencement of this suit, the now plaintiffs obtained and took out a summons in the said action, whereby the plaintiffs in the said action in the said second count mentioned were required to show cause why the said order and consent, and also the said judgment, should not be set aside, on the ground that the said consent had been given without the consent of the now plaintiffs, and against their instructions; that the said summons afterwards duly came on to be heard and argued, and the same was duly heard and argued, before Willes, J., who then dismissed the same, and ordered the now plaintiffs to pay the costs of the said application: That, afterwards, and before the commencement of *this suit, the now plaintiffs obtained a rule in the said action in her Majesty's [*77 Court of Exchequer of Pleas at Westminster, whereby the plaintiffs in the said action were required to show cause why the consent to judgment therein, dated the 14th day of July, 1862, and signed by Joseph and Thomas Parrott, the defendants' then attorneys, the order of Martin, B., and all subsequent proceedings, should not be set aside, on the ground that the said consent was given without the authority of the now plaintiffs; and that the said rule was afterwards, on the 24th of November, 1862, duly argued by counsel, and heard before the Barons of Her Majesty's Court of Exchequer of Pleas at Westminster, who afterwards, and before the commencement of this suit, to wit, on the 15th of January, 1863, discharged the said rule, with costs.

The defendants demurred to the second plea, the ground of demurrer stated in the margin being, "that the ordinary retainer of an attorney by a defendant in an action does not warrant or authorize the acts complained of in the second count, under the circumstances disclosed in the second plea." Joinder.

Coleridge, Q. C. (with whom was *Francis*), for the plaintiffs.(*a*)—It

(*a*) The points marked for argument on the part of the plaintiffs were as follows:—

"1. That the ordinary retainer of an attorney by a defendant in an action does not warrant or authorize the acts complained of in the second count, under the circumstances disclosed in the second plea:

"2. That the retainer of the defendants, as alleged in the second count, and admitted in the second plea, did not warrant or authorize the defendants to consent to the said order, and to compromise the action, without the authority, instructions, or consent of the plaintiffs."

is submitted,—first, that an attorney, even though acting bonâ fide and without negligence, and for the benefit of his client, has no authority to *compromise an action, he being merely employed to conduct or defend it,—secondly, that, at all events, he has no power as attorney to agree to any terms ultrà the action. The extent of the attorney's authority must depend upon the facts and circumstances of each particular case. [WILLES, J.—The plea is an argumentative denial of the negligence charged in the second count. It sets out something which is not complained of. It is an abuse to plead such a plea.] In Fray v. Vowles, 1 Ellis & Ellis 839 (E. C. L. R. vol. 102), it was held, that an attorney retained to conduct a cause, and having express directions from the client not to enter into a compromise, has no power, under such retainer, to enter into any compromise, even though it be reasonable and bonâ fide, and for the benefit of the client; and, if he do so, is liable to an action for damages, though the damage actually sustained be nominal: and that it is no defence to such action that the compromise was entered into by the advice of counsel retained and employed by the attorney, under his retainer, for the conduct of the cause. That shows that there is no such inference from the relation of attorney and client, that the client cannot limit the attorney's discretion; but the judgment goes far beyond that. Lord Campbell says: "The plea confesses that the defendant was retained as the plaintiff's attorney to conduct these actions for her; and that, having express directions not to make any compromise, he did make a compromise; but alleges, by way of avoidance, that the compromise was by the advice of counsel engaged by him under his retainer, and was for her benefit. That allegation must, I think, be taken to mean that the compromise was for her benefit in every point of view, pecuniary and otherwise. Is that a defence? I think not. An attorney retained to conduct a cause is entitled, in the exercise of his discretion, to enter into a compromise, if he *does so reasonably, skilfully, and bonâ fide (as the defendant is to be taken as having done), provided always that his client has given him no express directions to the contrary; but, where these directions have been given, such a step, though perhaps binding as between him and third parties, is ultra vires as between him and his client." Erle, J., said: "The client, and not the attorney, is the dominus litis; and, though a compromise by him, without the concurrence of the attorney, would be bad if (as I have sometimes seen) it were a conspiracy to deprive the latter of costs, still he has the general right to fix the extent of the retainer, by allowing or by forbidding a compromise." And Crompton, J., said: "This is an action for a breach of duty arising out of a contract between the attorney retained to conduct a cause and his client; and I think, that, upon such retainer, the effecting of a compromise by the attorney contrary to the express directions of his client, is a breach of duty. I agree with my Brother Erle that the client, as the dominus litis, has a right to decide whether or not there shall be a compromise: and, if he chooses to add to the general retainer the stipulation that there shall be no compromise, the attorney has no right afterwards to effect one." If the duty is correlative to the contract, it is a question in each case what the contract is. [BYLES, J.—I do not see how the

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question arises upon this record. The second count charges the defendants with negligence; and the plea is that the defendants exercised due and reasonable care and skill in the conduct of the defence to the ejectment. What is that but not guilty?] If what the defendants did was in breach of their retainer, it is negligence. [BYLES, J.—If it be necessary that the defendants should have express authority to do as they did, the plea contains an averment that they had it.] It alleges *that the defendants had it as attorneys and by virtue [*80
of the retainer. That raises the question whether the mere retaining an attorney to defend an action gives him authority to settle. It is not disputed that an attorney may have authority to refer a cause,—Filmer *v.* Delber, 3 Taunt. 486; Faviell *v.* The Eastern Counties Railway Company, 2 Exch. 344,—that is merely changing the tribunal. [BYLES, J.—Is there any precedent of an action against an attorney for referring a cause without authority.?] No. [BYLES, J.—It must have been done hundreds of times.] It has never been questioned. The mere fact of no instance being found is not conclusive of the question. In Swinfen *v.* Swinfen, 24 Beavan 549, 27 Law J. Ch. 35, where a compromise of a trial at law was made by counsel, upon the suggestion of an attorney that such compromise would be desirable, Sir John Romilly, M. R., held that it was not binding upon the client, who was not aware of it, had not sanctioned it, and refused to acquiesce in it. In giving judgment, His Honour says: "If an attorney is employed to conduct a suit for a client, a compromise does not in terms come within the scope of his authority: it is not within the management of the cause. Upon what principle, therefore, can it be said that there is an implied authority for an attorney to compromise the suit which he is employed to conduct? Suppose an attorney is employed to recover an estate, does the authority extend to selling that to a stranger? Yet a compromise is nothing more than a sale from the plaintiff to the defendant upon certain terms. I should as little expect an attorney to have such an authority as I should expect a person employed to take horses to a particular place to feed and to break them in, to have an implied authority to sell or to exchange them. A coachman drives my carriage, and I am liable for all *the acts which he does whilst driving the carriage: but he has [*81
no authority to sell or exchange the carriage. Unless there is some different rule applicable to attorneys, it is impossible to say that an attorney has an implied authority to dispose of the subject-matter of the suit, instead of conducting the cause, which he is employed to do." And the judgment of the Master of the Rolls was affirmed by the Lords Justices: see 27 Law J., Chan. 491. The opinions of the majority of this court when the motions were made here were the other way: see 18 C. B. 485 (E. C. L. R. vol. 86), 1 C. B. N. S. 364 (E. C. L. R. vol. 87). [WILLES, J.—And in a subsequent case of Chambers *v.* Mason, 5 C. B. N. S. 59, we adhered to the opinion of the majority.] The question in Swinfen *v.* Swinfen was different from the question here: it was whether the client could by attachment or by bill for specific performance be compelled to carry out a compromise which had been made without her consent and in defiance of her express commands. The case, therefore, does not touch the question whether or not she could have maintained an action against her attor

ney. [WILLES, J.—Swinfen *v.* Swinfen was the case of an issue out of Chancery; which fully accounts for the expressions used when the matter was before the equity judges.] In Viner's Abridgment, *Attorney* (P.), pl. 6, it is said that "the act of the attorney shall prejudice his master in the *principal matter;* for, if he confess the action without the consent and will of the master, this shall bind his master; but otherwise it is in *collateral* matters:" per Montague, J., and Haughton, J., in Gray *v.* Gray, 2 Roll. R. 63. The defendants, here, therefore, clearly could have no authority to bind their clients in the matter of the lease. The advice of counsel gives the attorney no protection. This is clearly settled in Godefroy *v.* Dalton, 6 Bingh. *469 (E. C. L. R. vol. 19), 4 M. & P. 169, and Fray *v.* Voules, 1 Ellis & Ellis 839 (E. C. L. R. vol. 102).

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O'Malley, Q. C. (with whom was *David Keane*), contrà.—The count is framed on the assumption that this was an ordinary retainer, and that the defendants were guilty of negligence. The plea alleges that the defendants by virtue of their retainer had authority so to conduct the defence as should seem to them to be best, that they acted with due and reasonable skill and care, and were guilty of no negligence, and that they acted in the manner most advantageous and beneficial to the interests of the plaintiffs. All the authorities admit that the compromise is binding as to third persons, although the attorney may be liable to his client if he act in defiance of a condition attaching to his authority in the origin of his employment; but it must be a stipulation necessarily qualifying the authority arising from the retainer. Fray *v.* Voules, 1 Ellis & Ellis 839, is in favour of the defendants. That was an action against the attorney for express transgression of the terms of the authority conferred upon him by the client. [WILLES, J.—The cases are all collected in Lush's Practice, 2d edit. 195, 196.]

ERLE, C. J.—I am of opinion that the plea is an answer to the charge of negligence, as put by Mr. O'Malley, and can be sustained without going into the general question, whether an ordinary retainer authorizes the attorney to compromise the suit, in the absence of express directions to him to the contrary. Under the circumstances disclosed by the plea, I think the plaintiff's claim is clearly not sustainable. The plea states that the defendants had no special instructions not to compromise the action, and were under their retainer at full liberty to conduct the action in such manner as in the exercise of due and reasonable *skill and care should appear to them to be and should be most advantageous and beneficial to the interests of the plaintiffs; that they acted in good faith, and in doing as they did exercised due and reasonable skill and care; and that it appeared to them that in taking the course they did they were acting, and they were in fact acting, in the manner most advantageous and beneficial to the interests of the plaintiffs. This, therefore, goes far beyond any of the cases. I apprehend the rule of law is well established, that the general authority to conduct a cause gives the attorney authority to compromise. The reason why the compromise is held to be binding upon the client, is, because the attorney is his general agent for that purpose. I think that is established by Fray *v.* Voules, 1 Ellis & Ellis 839, where it was held that an attorney who makes a compromise in defiance of the express directions of his client not to

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do so, is guilty of a breach of duty. Two of the judges say that it depends upon the contract in each particular case, and hold (which was sufficient for the decision of that case) that the action lay against the attorney there because he was prohibited; which would seem to imply, that, if he had not been expressly prohibited from compromising, the compromise would have been a lawful act on his part. I think the defendants are entitled to judgment.

WILLES, J.—I am of the same opinion. I have already stated the view I take. I would only add that the order of my Brother Martin is a mere order that the plaintiffs shall have judgment by default, and that the plaintiffs in the ejectment shall, if the defendants think fit to call for it, grant them a lease of the Long Close. This latter stipulation in no degree prejudices the parties. Then, does an action lie against an attorney merely because he has suffered judgment to *go by default, although in so doing he may have acted with the most consummate skill and care, and his doing so may have been greatly for the benefit of his client? I cannot give my assent to a conclusion so absurd. [*84

BYLES, J.—I need only say that I concur in the opinions expressed by my Lord and my Brother Willes. In matters of this nature, the responsibility of attorneys (from which counsel are exempt) is already sufficiently serious. In Fray *v.* Voules, 1 Ellis & Ellis 839 (E. C. L. R. vol. 102), the attorney did not exercise due and reasonable care and skill: he agreed to a compromise in defiance of the express protest of his client. Here, however, the record shows that what was done by the defendants was done in the exercise of their ordinary duty, and in a skilful, careful, and proper manner.

KEATING, J.—I am of the same opinion. Attorneys must of necessity, in the absence of express instructions to the contrary, have the authority alleged in this plea, which I think affords a complete defence to the charge of negligence. It may be that the distinction suggested by Mr. Coleridge is well founded. The case of Fray *v.* Voules furnishes an instance of that. It may well be that the general authority of the attorney may be limited by express instructions. Our judgment on this occasion does not in the least interfere with anything there said as to the plaintiff being dominus litis.

Judgment for the defendants.

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*INGLEBACH and Another *v.* NICHOLS. *April* 27. [*85

A deed of composition, which purported to be made between the debtor and the several persons, creditors, whose names and seals were subscribed and affixed thereto, contained the following covenant,—"And each of them the said creditors parties hereto doth hereby for himself, his executors, &c., covenant with the said N. (the debtor), his executors, &c, to retire and deliver up to him and them, cancelled and discharged, *all* bills of exchange or promissory notes given to the said creditors or any or either of them before the date hereof, for any debt due to him or them from the said N., or for which the said N. is liable, and to hold him and them harmless against all costs, charges, damages, and expenses to which they or he may be put in consequence of or in default of the non-retirement of the same":—Held, not a valid deed within the 192d section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134.

THIS was an action for goods bargained and sold, goods sold and delivered, and money found due upon accounts stated.

Plea, that, the defendant being indebted to divers other persons besides the plaintiffs, a deed or instrument was made and entered into between the defendant and divers of the said creditors relating to the debts and liabilities of the defendant and his release therefrom, according to the 192d section or clause of and contained in the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), and, on and after the making and entering into the said deed, the conditions, matters, and things in that behalf required to be observed, performed, and fulfilled, by the said section, clause, and statute, to make the same valid and effectual and binding on the plaintiffs and all the creditors of the defendant, as if they were parties to and had duly executed the same, were observed, performed, and fulfilled: that the said deed was and is to the tenor following, that is to say,—"This indenture, made this 20th of November, 1861, between William James Nichols, of, &c., warehouseman, of the first part, and *the several other persons, creditors of the said William James Nichols, whose names and seals, or the names and seals of whose respective firms, are hereto subscribed and affixed, of the second part:* Whereas, the said William James Nichols is indebted to the several persons parties hereto of the second part in the several sums of money set opposite to their respective names in the schedule hereunder written, and, being unable to discharge the said debts in full, it has been
*86] *proposed by the said William James Nichols, and agreed to by the said parties to these presents, that the said several creditors shall accept from him a composition of 5*s.* in the pound on their respective debts, in full satisfaction and discharge thereof, payable as follows,—half of the said composition in a week from the date hereof, and the remainder to be secured by bills of exchange to be drawn by the said William James Nichols upon and accepted by W. F. B., and endorsed by the said William James Nichols: And whereas the said half of the said composition has been duly paid to the said creditors whose names and seals are hereunder subscribed and affixed, as they do hereby respectively admit and acknowledge, and they have also respectively received the said bills of exchange before the execution hereof: Now, this indenture witnesseth, that, in consideration of the premises, and of the delivery to the said several creditors respectively of the said composition bills as aforesaid, as they the said creditors respectively do hereby acknowledge and admit, they the said creditors parties hereto of the second part do hereby for themselves severally and for their several and respective heirs, executors, administrators, and partners, and not jointly or any one of them for any other or others of them, but each of them for himself, his heirs, executors, administrators, and partners, covenant with the said William James Nichols, his executors and administrators, that, if the said bills of exchange shall be duly paid when the same become due and payable according to the tenor and effect thereof, then and from thenceforth these presents shall operate and enure, and be considered and taken to operate and enure, as and for a full and absolute discharge and release to and for the said William James Nichols, his executors and administrators, of and from all debts, sum and sums
*87] of money, accounts, *reckonings, claims, and demands whatsoever, and all manner of actions and suits both at law and in equity which they the said creditors or any or either of them now

have or hath, or ever had, or which they or any or either of their executors, administrators, or partners, as aforesaid, at any time or times hereafter can, shall, or may have, claim, challenge, or demand against the said William James Nichols, his executors or administrators, for or by means or on account of any matter or thing anterior to the date hereof: Provided always, and these presents are upon this express condition, that, if the said William James Nichols shall become bankrupt before the said bills of exchange shall become due and payable, then and in such case each and every of the said several creditors whose names or partnership firms and seals are hereunto set and subscribed shall be at liberty to prove under any such bankruptcy, and to claim and demand against the said William James Nichols, or his lands and tenements, goods and chattels, the full amount of each and every the said several creditors' several and respective original debts set opposite to their respective names in the schedule hereunder written, deducting only so much as they shall have actually received by the payment of the said half part of the said composition in manner aforesaid; and that without prejudice to the rights of the several creditors to recover the amounts or balances of their said several and respective debts from the said William James Nichols: Provided always, that, in the event of the said William James Nichols becoming bankrupt as aforesaid, and the proof of all or any of the said creditors under any such bankruptcy of their several debts as aforesaid agreeably to the last-mentioned proviso, if before the payment of a dividend or dividends under any such bankruptcy all the said bills of exchange shall be duly paid and discharged at *maturity, then and in such case all and every the [*88
dividend and dividends, and such proof and proofs under any
such bankruptcy or insolvency, shall be held for and paid to the said William James Nichols: *And each of them the said creditors parties hereto doth hereby for himself, his executors and administrators, covenant with the said William James Nichols, his executors and administrators, to retire and deliver up to him and them, cancelled and discharged, all bills of exchange or promissory notes given to the said creditors or any or either of them before the date hereof, for any debt due to him or them from the said William James Nichols, or for which the said William James Nichols is liable, and to hold him and them harmless against all costs, charges, damages, and expenses to which they or he may be put in consequence of or in default of the non-retirement of the same.* In witness," &c. Averment, that the defendant had done and performed all things, and all things had happened and existed, as required by the said deed, or otherwise, to release and discharge the defendant from the payment of the plaintiffs' claim in this action.

To this plea the plaintiffs demurred, the ground of demurrer stated in the margin being "that the deed as set out in the plea is not a deed within the 192d section of the 24 & 25 Vict. c. 134, and is not binding on the plaintiffs." Joinder.

V. Williams, in support of the demurrer.(a)—This *deed is [*89
void upon two grounds,—first, it is a deed which purports to

(a) The points marked for argument on the part of the plaintiffs were as follows:—

"1 That the plaintiffs, not having executed the deed, or assented thereto in writing, are not bound thereby:

be made between Nichols and those creditors who execute it, and consequently it is not a deed for the benefit of *all* his creditors, and so not within the 192d section: Walter *v.* Adcock, 7 Hurslt. & N 541; Ex parte Rawlings, 32 Law J., Bankruptcy, 27; Ex parte Golden, In re Shettle, 32 Law J., Bankruptcy, 37; Ex parte Morgan, In re Woodhouse, 32 Law J., Bankruptcy, 15; Berridge *v.* Abbott, 13 C. B. N. S. 507. The next objection is, that the deed contains an unreasonable covenant, viz. a covenant by the creditors parties thereto to retire and deliver up to the debtor, cancelled and discharged, all bills of exchange or promissory notes given to the said creditors or any or either of them before the date of the deed, for any debt due to him or them from the debtor, or for which the debtor was liable, and to hold him harmless against all costs and damages to which he may be put in consequence of the non-retirement of the same. It was expressly held by the Exchequer Chamber, in Woods *v.* Foote, 8 Law T. N. S. 836, that such a covenant was an unreasonable covenant, and such as a creditor coming in, even if willing to accept the composition, could not be expected to be bound by; and that a deed containing such a covenant could not be supported. "Such a covenant as this," said Wightman, J., in delivering the judgment of the court, "by which the creditors indemnify the debtor from liability upon any outstanding paper to which his name may be attached, and render themselves responsible to liabilities of an
*90] *unknown and uncertain amount, seems to us to be a covenant entirely unreasonable. On that simple ground alone, without entering into the other questions which have been raised, we think the deed cannot be supported." In that case, too, each creditor covenanted for his own acts only,—a limitation which is not found in this covenant.

Grant, contrà (*a*)—The covenant to retire and to indemnify applies only to the bills given for the half composition. [WILLES, J.—Clearly not: it expressly applies to "*all* bills of exchange or promissory notes given to the said creditors or any or either of them before the date of the deed, for any debt due to him or them from Nichols, or for which Nichols was liable." But, suppose it were as you suggest, what pretence can there be for making each creditor liable for the acts of all the rest, and for all costs?]

PER CURIAM.—The covenant last referred to is quite enough, independently of any other objection, to render this deed void. There must be judgment for the plaintiffs.

Judgment for the plaintiffs.

"2. That the deed does not purport to be entered into between the debtor and *all* his creditors, or between the debtor and any person on behalf of *all* his creditors:

"3. That the deed does not purport to be for the benefit of *all* the debtor's creditors:

"4. That the deed does not contain any cessio bonorum."*

(*a*) The point marked for argument on the part of the defendant was as follows:—

"That the deed set forth in the plea is a valid and binding deed within the 192d and other sections of the Bankruptcy Act, 1861, and so as to bar this action."

* This last is now admitted to be unnecessary: see the judgment of Lord Westbury, C., in Ex parte Morgan, In re Woodhouse, 32 Law J., Bankruptcy 15, 8 Law Times N. S. 729.

*COPEMAN *v.* HART. *May* 4. [*91

A deed of composition which in terms excludes all creditors who do not execute within a given time, is not a valid deed within the 192d section of the Bankruptcy Act, 24 & 25 Vict c. 134.

THIS was an action for goods sold and delivered, goods bargained and sold, and money found due upon accounts stated.

Plea, that, after the accruing of the causes of action in the declaration mentioned and the passing of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), and before action brought, the defendant entered into a certain deed of composition with his creditors, which said deed was and is in the words and figures following,—"This indenture, made the 14th day of August, 1862, between George Hart, of, &c., of the first part, Charles Chase, of, &c. (trustee for himself and the rest of the creditors of the said George Hart parties hereto), of the second part, Charles Warne, of, &c., of the third part, and the several other persons whose names and seals are hereunto subscribed and set, being respectively creditors of the said George Hart, of the fourth part: Whereas the said George Hart is justly indebted unto the said parties hereto of the second, third, and fourth parts in the several sums set opposite to their respective names in the schedule hereunder written, which he is unable to pay in full: And whereas the said parties hereto of the second, third, and fourth parts have agreed to accept a composition of 9*s.* in the pound on the amounts of their respective debts, and to release the said George Hart from the whole of such debts, on condition that the said composition is paid to them at the times hereinafter mentioned, and that the payment thereof is secured in manner hereinafter expressed: Now this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the premises, and of 5*s.* of sterling money to the *said George Hart paid by the said [*92
Charles Chase at or before the execution hereof, the receipt whereof is hereby acknowledged, the said George Hart doth hereby bargain, sell, assign, transfer, and set over unto the said Charles Chase, his executors, administrators, and assigns, all and every the stock in trade, goods, wares, merchandises, household furniture, fixtures, plate, linen, china, books of account, debts, sum and sums of money, and all securities for money, vouchers, and other documents, writings, and all other the personal estate and effects whatsoever and wheresoever of him the said George Hart, in possession, reversion, or expectancy, together with full and free possession, right, and title of entry in and to all and every of the messuages or tenements and premises wherein the said several effects and premises now are, To have and to hold the said stock in trade, and all other the estate, effects, and premises hereby assigned, or intended so to be, unto the said Charles Chase, his executors, administrators, and assigns, absolutely; but, nevertheless, upon the trusts hereinafter contained: And the said George Hart doth hereby make, constitute, and appoint the said Charles Chase, his executors and administrators, to be his true and lawful attorney and attorneys, to ask, demand, sue for, recover, and receive, all debts and sums of money owing to him the said George Hart, and all other the premises hereby assigned, or intended so to be; and, on payment or delivery thereof or any part thereof respectively, to sign, seal, and

execute receipts, acquittances, or other discharges for the same respectively; and, on non-payment or non-delivery thereof respectively, to commence and prosecute any action, suit, or other proceedings whatsoever for recovering and compelling the delivery or payment thereof respectively: and also to adjust, liquidate, and finally settle, all
*93] accounts, *dealings, and transactions whatsoever relating to the said trust-estate and premises; and for all or any of the purposes aforesaid to use the name of the said George Hart; and whatsoever the said Charles Chase, his executors or administrators, shall lawfully do or cause to be done in the premises, the said George Hart doth hereby, for himself, his heirs, executors, and administrators, covenant with the said Charles Chase, his executors, administrators, and assigns, to allow, ratify, and confirm: Provided always, and it is hereby agreed and declared, that every receipt of the said Charles Chase, his executors and administrators, for any money payable to him or them by virtue of these presents, shall effectually discharge the persons paying the same from being obliged to see to the application thereof, or from being answerable or accountable for the misapplication or non-application thereof: And, further, that the said Charles Chase, his executors and administrators, shall not be answerable for any loss or damage which may happen in the execution of the trusts herein contained without his wilful default; and also that it shall be lawful for the said Charles Chase to make to the said George Hart such allowance or return to him such part of his household furniture or effects, not exceeding the value of 20*l.*, as he may deem expedient: And the said George Hart and Charles Warne do hereby for themselves and their respective heirs, executors, and administrators, jointly, and each of them doth hereby for himself, his heirs, executors, and administrators, separately, covenant with the said Charles Chase, his executors and administrators, that they the said George Hart and Charles Warne, or one of them, their or one of their heirs, executors, or administrators, shall and will pay unto the said Charles Chase, his
*94] executors or administrators, as such trustee or *trustees for himself and the said parties hereto of the third and fourth parts a composition of 9*s.* in the pound on the respective amounts of the debts of the said Charles Chase and the said parties hereto of the second and third parts, at the times following, that is to say, the sum of 4*s.* 6*d.* in the pound on the 10th of February, 1863, and the further sum of 4*s.* 6*d.* in the pound on the 10th of August, 1863: Provided always, that, if default shall be made in the payment of the said composition of 9*s.* in the pound at the times hereinbefore mentioned, or either of them, then it shall be lawful for the said Charles Chase, his executors and administrators, and he and they are hereby fully empowered, without any further concurrence of the said George Hart or any other person or persons whomsoever, to collect and receive and sell and dispose of the said hereby-assigned premises, and every part thereof, either by public sale or private contract, and in one or more lot or lots, with liberty to give any credit for the same or to take any security for the purchase-money or any part thereof, as to the said Charles Chase, his executors or administrators, shall seem proper; and upon trust, out of the moneys to be received by virtue of these

presents, to pay all costs and expenses of proposing, preparing, engrossing, and executing these presents, and attending or relating to the said hereby assigned premises or the trusts hereby created; and, in the next place, to retain, pay, and satisfy rateably and proportionably, without any preference or priority, *to himself the said Charles Chase and the other persons parties hereto who shall execute these presents within three calendar months from the date hereof*, the several debts or sums set opposite to their respective names in the said schedule hereto: *Provided nevertheless that such creditors of the said George Hart as shall not execute or assent in writing to* **take the benefit of these presents on or before the ——— day of November next shall be excluded from all benefit under these presents:* And this indenture lastly witnesseth, that, in consideration of the premises, and of the assignment and covenant hereinbefore contained, the said several creditors parties hereto of the second, third, and fourth parts do and each of them doth hereby acquit, release, and for ever discharge the said George Hart of and from all and all manner of debt and debts, sum and sums of money, bills, bonds, notes, accounts, reckonings, judgments, executions, actions, suits, claims, and demands whatsoever, which they the said releasing parties or any or either of them, their or any or either of their partner or partners, now have or hereafter may have against the said George Hart, his executors or administrators, for or in respect of any debt, transaction, matter, or thing up to the day of the date hereof: In witness," &c.: Averment, that the defendant and the said Charles Chase and Charles Warne and certain of the creditors of the defendant executed the said deed, such creditors being a majority in number representing three fourths in value of all his creditors whose debts amounted respectively to 10*l.* and upwards; and that the said creditors who so executed the said deed in writing assented to and approved of the said deed; and that all the conditions required by the Bankruptcy Acts now in force concerning deeds of composition were complied with and fulfilled by the said defendant, so that the said deed became, and the defendant said that the same did become, and was, binding on all the creditors of the said defendant, including the plaintiff. [*95

The plaintiff demurred to this plea, the ground of demurrer stated in the margin being, "that the deed only purports to bind creditors acceding within a *given time, and it therefore is not a valid deed within the Bankruptcy Act, 1861, or otherwise binding on the plaintiff." Joinder. [*96

Aspland, in support of the demurrer.(*a*)—The main objection to this deed is, that the benefit of it is limited to those creditors who execute within three months: Berridge *v.* Abbott, 13 C. B. N. S. 507 (E. C. L. R. vol. 106), and the cases there cited.

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"That the deed pleaded by the defendant is not binding on the plaintiff as a non-executing creditor, because it purports only to be made with executing creditors, and provides for payment of a composition to executing creditors only, and because it requires creditors to execute within a specified time, and purports to release only the claims of executing creditors, and contains no release of the debt now sued for, and otherwise is not a deed of composition within the provisions of the Bankruptcy Acts: and that the plea is bad for not showing that the deed was executed or registered before this suit."

F. M. White, contrà, was called upon to support his plea.(a)—The distinction between this case and Ex parte Morgan, In re Woodhouse, 32 Law J., Bankruptcy, 15, is obvious. The proviso "that such cre-
*97] ditors of Hart *as shall not execute or assent in writing to take the benefit of the deed" within the time limited "shall be excluded from all benefit" under it, has not the effect supposed; for, in equity it is held that time is not of the essence of the deed, but the party might come in and claim the benefit of it at any time: Whitmore *v.* Turquand, 30 Law J., Chan. 345; and, if the deed might operate for the benefit of non-assenting creditors, it is a good deed within s. 192 of the 24 & 25 Vict. c. 134. In Ex parte Godden, In re Shettle, 32 Law J., Bankruptcy, 37, secured creditors were expressly excluded. In Ingelbach *v.* Nichols, antè, p. 85, the deed purported to be made only between the debtor and the assenting creditors: here, it is made with a trustee for all who may hereafter assent to it. The non-execution is cured by s. 197, which enacts, that, "from and after the registration of such deed or instrument in manner aforesaid, the debtor and creditors and trustees, parties to such deed, or who have assented thereto *or are bound thereby*, shall in all matters relating to the estate and effects of such debtor be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy." In Harris *v.* Pettit, 31 Law J., Ch. 552, where the question was whether a deed of this sort (all the provisions of the 68th section of the Bankrupt Law Consolidation Act, 1849, having been complied with) was an act of bankruptcy, Vice-Chancellor Stuart says: "The argument in support of the proposition that the deed was an act of bankruptcy, is, that it is not a deed in favour of *all* the creditors of Ivens,
*98] because it is only in favour of those particular creditors *of his who should come in and prove within a given time. I am clearly of opinion that the assignment was for the benefit of all Ivens's creditors, because as soon as it had been executed by him and his trustees one and all of his creditors were entitled to come in and take a dividend out of his estate. To say that because some creditors might not come in under the assignment, therefore it was not for the benefit of all of them, is an argument which is not maintainable." That case is precisely in point. [WILLES, J.—Legg *v.* Cheesebrough, 5 C. B. N. S. 741 (E. C. L. R. vol. 94), shows that it is only the persons whose names and seals are affixed to the deed who are bound by it. The language of the recent Bankruptcy Act is the same in this respect as that of the old one.] Macnaught *v.* Rüssell, 1 Hurlst. & N. 611, and Irving *v.* Gray, 3 Hurlst. & N. 34, show that this is a

(a) The points marked for argument on the part of the defendant were as follows:—

"That the deed set out in the plea is by virtue of the 192d section of the Bankruptcy Act, 1861, binding on all the creditors of the defendant, including the plaintiff, although he did not execute the same, and that the plea sufficiently shows that the provisions of that act have been complied with; and that the defendant by the operation of the said deed was thereupon released from the causes of action alleged in the declaration:

"And that the deed and assignment thereby made were in effect for the benefit of *all* the creditors of the defendant."

valid deed. [WILLES, J.—Both those cases were cited and distinguished in Legg *v.* Cheesebrough.] If this be a good deed either at law or in equity, it is within s. 192 of the Bankruptcy Act, 1861.

ERLE, C. J.—As I read the judgment of the Lord Chancellor in Ex parte Morgan, In re Woodhouse, 32 Law J., Bankruptcy, 15, a deed in the form of that set out in this plea is not a valid deed. The proviso which follows the distribution clause is rather an aggravation than a cure of the disease.

The rest of the court concurring,

Judgment for the plaintiff.(*a*)

(*a*) See the next case.

*ILDERTON *v.* CASTRIQUE. *May* 6. [*99

A deed of composition which purports to be made between the debtor and such of his creditors as shall execute the same, and which either expressly or impliedly excludes from its benefits and provisions non-executing creditors, is not a valid deed within the 192d section of the Bankruptcy Act, 1861.

ON the 20th of December, 1861, judgment was signed against the defendant in this cause for 188*l.* 16*s.* 6*d.*, the sum found due by an arbitrator to whom the same and all matters in difference between the parties were referred by an order of nisi prius. On the 31st of March, 1862, the plaintiff discovered that the defendant had executed a deed purporting to be a deed of composition and release between himself and his creditors, dated the 17th of January, 1862, whereby he proposed to pay and his said creditors agreed to accept a composition of 2*s.* 6*d.* in the pound in full satisfaction and discharge of their debts, to be paid by the defendant within one month from the execution of the deed, and that the deed had been duly left for registration pursuant to the provisions of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. The deed was as follows:—

"This indenture, made the 17th day of January, 1862, between Louis Castrique, of, &c., of the first part, and the several other persons creditors of the said Louis Castrique whose names and seals or the names and seals of whose respective firms are hereto subscribed and affixed, of the second part: Whereas the said Louis Castrique is indebted to the several parties hereto of the second part in the several sums of money set opposite their respective names in the schedule hereunder written, and being unable, owing to the numerous and heavy losses which he has recently sustained in his business, and of which the said parties hereto of the second part are well aware, to pay his said debts in full, has proposed to his said creditors to pay them a composition of 2*s.* 6*d.* in the *pound on their respective debts, in [*100
full satisfaction and discharge thereof, such composition to be payable within one calendar month from the date and execution of these presents by the said Louis Castrique; and the said creditors, parties hereto of the second part, have respectively agreed to accept the said composition in full discharge of their said debts, and to release the said Louis Castrique therefrom in manner hereinafter appearing: Now, this indenture witnesseth, that, in consideration of the pre-

mises, and in performance of the agreement hereinbefore expressed, they the said several creditors parties hereto of the second part do hereby, for themselves severally and for their several and respective heirs, executors, administrators, and partner or partners, and not jointly or any one of them for any others or other of them, but each of them for himself only, and for his heirs, executors, administrators, and partners, covenant with the said Louis Castrique, his executors and administrators, that, if and provided the said Louis Castrique, or his executors or administrators, or any person whosoever on his or their behalf, shall at any time within one calendar month from the date and execution of these presents by the said Louis Castrique, pay or tender to each of them the said several creditors parties hereto of the second part a composition of 2*s.* 6*d.* in the pound upon the amount of their respective debts as set against their respective names and seals in the schedule hereto, they the said creditors parties hereto of the second part, and their respective executors and administrators and partner or partners, shall and will accept and take such composition as, and the same shall thenceforth operate and enure and be taken for, a full and absolute discharge and release to and for the said Louis Castrique, his executors and administrators, of and from the said debts of the said
*101] *several creditors parties hereto of the second part so set against their respective names and seals in the schedule hereto, and from and against all other debts whatsoever, sum or sums of money, accounts, reckonings, claims, and demands whatsoever now due or owing by the said Louis Castrique to the said parties hereto of the second part or any of them; and all and all manner of actions and suits, rights and remedies, claims, and demands whatsoever both at law and in equity which they the said creditors parties hereto of the second part, or any or either of them, or their, any or either of their partner or partners, now hath or have or ever had, or which they or any or either of their executors or administrators, partners, or assigns, at any time hereafter can or may hereafter have, claim, challenge, or demand against the said Louis Castrique, his executors or administrators, for or by means or on account of the said debts so due to them as aforesaid, or of any other matter or thing whatsoever anterior to the date hereof; nevertheless, saving to the said creditors respectively and their respective executors and administrators and partners all claims and demands, cause and causes of action upon and against third parties (if any) liable to pay the debts due to the said creditors respectively as set out in the schedule hereto, or any part thereof, and also without prejudice to any security which the said creditors parties hereto may hold for their respective debts: Provided always, and these presents are upon this express condition, that is to say, that the said composition shall be paid or tendered to the said creditors within one calendar month from the date and execution of these presents by the said Louis Castrique, and if not so paid or tendered then the said creditors shall not after the expiration of such calendar month be bound to accept
*102] the same, but these presents shall thereupon become absolutely *void and of no effect, and the said creditors shall thereupon be restored to their original rights as if these presents had not been made. In witness whereof the parties hereto have hereunto set their hands and seals the day and year first within written."

The deed was executed by the debtor and by eight creditors whose debts in the aggregate amounted to 4046*l.* 4*s.* 9*d.*

Being advised that the above deed was not a valid deed within the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, the plaintiff on the 3d of July issued a fi. fa. on the said judgment, under which the sheriff seized the defendant's goods. On the 10th of July, the defendant took out a summons calling upon the plaintiff to show cause why the fi. fa. and all proceedings thereunder should not be set aside for irregularity, "the same having been issued without leave of the court of bankruptcy after the defendant had obtained a certificate of protection under s. 198 of the Bankruptcy Act, 1861." The summons was heard before Willes, J., on the 14th of July, when it was submitted on the part of the plaintiff that the execution ought not to be set aside, for that the deed being invalid the certificate of registration afforded no protection to the defendant's person or property. The learned judge, with a view to the opinion of the court being taken, made an order, that, "upon payment to the sheriff of the sum of 38*s.* 6*d.* for possession money, and bringing into court within two days the sum of 70*l.*, the sheriff do withdraw, the defendant consenting that this order shall be without prejudice to any further execution after the opinion of the court is obtained."

The 70*l.* having been brought into court pursuant to the above order, *Holl*, in Michaelmas Term last,—upon an affidavit *setting forth the above facts, and stating that the plaintiff was no party to nor did he execute the deed,—obtained a rule calling upon the defendant to show cause why the money should not be paid out of court to the plaintiff, "on the ground that the certificate of registration of the deed of composition and release between the defendant and certain of his creditors, bearing date the 17th day of January, 1862, does not afford any protection to the defendant as against the plaintiff, the same not being a deed within the meaning of the 192d section of the Bankruptcy Act, 1861, on the grounds following,—first, that the said deed does not contain any assignment of the defendant's property or any part thereof to or for the benefit of his creditors, and further does not contain any covenant binding the defendant to make any payment whatever to his creditors,—secondly, that the said deed does not and by its terms cannot include any of the creditors of the defendant who have not executed the same, and that the language thereof is such as in express terms to exclude from its benefits and provisions all such creditors of the defendant as have not executed the same,—thirdly, that the provisoes in the said deed saving to the creditors, first, all claims against third parties, and, secondly, that the said deed should be without prejudice to any securities which the creditors might hold for their debts, are calculated to give to creditors having such claims or securities an undue and unfair advantage over the other creditors, and prevents the deed from operating to put the several creditors on equal terms, and from giving the like advantage to each." [*103

Mellish, Q. C., and *Trevelyan*, now showed cause, upon affidavits stating, amongst other things, that an application had been unsuccessfully made by the *plaintiff to Mr. Commissioner Holroyd for leave to issue execution upon his judgment; that the deed [*104

and the amount of the composition had been duly tendered to the plaintiff for his execution and acceptance, after the deed had been executed by the defendant and by the eight creditors whose names appeared in the schedule, and who constituted more than a majority in number and represented more than three-fourths in value of all his creditors at that time; but that the plaintiff refused to execute the one or receive the other. The question is whether the deed executed by the defendant is a valid deed within s. 192 of the 24 & 25 Vict. c. 134. It may now be considered to be settled by the decisions of the Lords Justices in Ex parte Rawlings, In re Rawlings, 32 Law J., Bankruptcy, 27, and Ex parte Godden, In re Shettle, 32 Law J., Bankruptcy, 37, and of the Lord Chancellor in Ex parte Morgan, In re Woodhouse, 32 Law J., Bankruptcy, 15, that a composition deed is within s. 192. It is also thrown out that the composition must be with or available for *all* the creditors. [WILLES, J.—When I made the order I had the decision of this court in Legg *v.* Cheesebrough, 5 C. B. N. S. 741 (E. C. L. R. vol. 94), in my mind.] Here, the deed purports to be made between the debtor of the first part, and "the several other persons creditors of the said Louis Castrique whose names and seals, &c., are hereto subscribed and affixed," of the second part: and all through the deed the covenants are with "the said creditors parties hereto of the second part." That has always been the common form. (*a*) The names of the parties could not be inserted at the commencement of the instrument. None of the creditors are in terms excluded from participation. The deed, there-
*105] fore, is not open to the objection *which was held to render the deed void in Walter *v.* Adcock, 7 Hurlst. & N. 541. In the reign of William 3, there was a statute, 8 & 9 W. 3, c. 18,(*b*) the language of which was similar to though better expressed than that of the existing statute. The title of that act was "An act for relief of creditors, by making compositions with their debtors, in case two thirds in number and value do agree." It recites that "many debtors, disabled by losses and misfortunes to pay their whole debts, are often willing to make what satisfaction they can for the same, so as they may enjoy their liberty upon reasonable agreements or compositions; but, some few creditors insisting on their whole debts, and executors, administrators, guardians, or trustees being incapacitated to make any composition, such debtors, despairing to see an end of their troubles, transport themselves and their effects beyond sea or consume the same in prisons or pretended privileged places, to their utter ruin, and become useless to the government and their families, a burthen to their relations or the parishes they live in, and all their creditors lose what may be had for their debts;" and enacts for remedy thereof "that it shall and may be lawful to and for two-third parts or more in number and value of all real creditors, their exe-

(*a*) Unless a trustee is interposed.

(*b*) To be found only in the Statutes of the Realm. This statute was repealed by the 9 & 10 Will. 3, c. 29, which recites that that act "had not answered the end for which the same was intended, in regard that, notwithstanding the provisions in the said act for preventing frauds in the making such compositions, many fraudulent practices had been committed, by making pretended agreements with persons who were not real creditors, and for greater advantages than what were expressed in such compositions; which practices had (as there was just cause to fear) occasioned much perjury."

cutors, administrators, guardians, and trustees, and other persons *authorized by them or any of them, to make such agreements or compositions as they shall think fit and reasonable [*106 with any of their debtors who, being unable to pay their whole debts, have withdrawn or absconded themselves from their usual places of abode, or are or shall become prisoners for debt before the 17th of November, 1696; and that every such agreement or composition, being made for the equal benefit of all the creditors in proportion to their respective debts, and subscribed and sealed by the aforesaid two-third parts or more in value, without any secret, fraudulent, or collateral agreement for any greater advantage than is therein expressed, shall be binding to and conclude all the other creditors, their executors, administrators, guardians, and trustees, and all persons authorized by or claiming under them or any of them, as fully and effectually to all intents and purposes as if all and every of them had actually made and subscribed and sealed such agreement or composition; and no executor, administrator, guardian, or trustee shall be chargeable or accountable for more than what he or she shall receive thereby; any former law to the contrary in anywise notwithstanding." Two cases occurred while that act was in force, viz. Ellis *v.* Ollave, 3 Salk. 60, and Feltham *v.* Cudworth, 2 Ld. Raym. 760, 3 Salk. 59, Comyns 112, 7 Mod. 10. In the first-mentioned case, an objection was made to the composition, "for that the agreement appeared to be only to, for, and with these creditors who were parties and had signed the composition; but this objection was disallowed, *because the statute makes this an agreement for the rest.*" [WILLES, J.—The 3d Salkeld has always been considered apocryphal.] In Feltham *v.* Cudworth, it was held, that, where a statute authorizes a certain proportion of a man's creditors to enter into a composition with him, and declares that such a *composition being entered into for the equal [*107 benefit of all his creditors, shall bind all, a composition to take a certain sum in the pound for the debts due to such of the creditors as should sign it, is a composition within the statute for the benefit of *all* the creditors, and *all* will be entitled to it. In the argument there it is said (2 Ld. Raym. 763): "A second exception taken by the plaintiff's counsel was, that the act, as it is pleaded, is, that every composition made for the equal benefit of all the creditors in proportion to their respective debts, and subscribed and signed by two third parts in number and value, shall bind, &c., then this composition pleaded in the defendant's plea does not appear to be made for the equal benefit of all the creditors; for, it is pleaded to have been made by two-thirds in number and value, and that they agreed to accept 2*d.* for every pound due to themselves; so that it was made for their benefit only, and not for the benefit of the other creditors; and consequently the composition is not such as will oblige the other creditors by the act of parliament." To which it was answered by the defendant's counsel, "that this composition was for the equal benefit of the two-third parts, &c., and made by them, and then their act will oblige the rest, and they also might have taken advantage of the composition, and might have demanded the 2*d.* for every pound of their debts, as well as the subscribers, and so in effect and by the law it is a composition for the equal benefit of all the creditors." And

Holt, C. J., "seemed to be strongly of opinion that this composition was for the equal benefit of all the creditors." [WILLES, J.—The names of *all* the creditors and the amount of their respective debts are mentioned in the deed there: and the agreement with the subscribers is, to pay all.] It must have been to pay the subscribers; otherwise the argument in Comyns's report does not apply. The *108] *following summary of the case in Comyns's Digest, *Pleader* 2 G. 6,—"It is sufficient if it be for the equal benefit of all the creditors, though it be not so mentioned in the composition,"—shows the Chief Baron's understanding of it. The judgment of Lord Justice Turner in Ex parte Rawlings, 32 Law J., Bankruptcy, 27, imposes greater difficulty upon the defendant here than does that of the Lord Chancellor in Ex parte Morgan, In re Woodhouse, 32 Law J., Bankruptcy, 15: but in both the *decision* went upon another point. The 192d section seems to contemplate that the non-signing creditor would be a party to the deed. If the deed is intended and can enure for the benefit of *all* the creditors, and is capable of being signed by all, as soon as the proper number have signed it, the law takes the hands and seals of the rest and affixes them to the deed. The legislature looked to the ordinary form of a composition deed. In Ex parte Morgan, the trust was expressly confined to those creditors who should execute the deed within twenty-eight days: and upon that the Lord Chancellor observes,—"The trustees are not to hold the property in trust for all the creditors, with a proviso that the creditors shall come in within the ordinary time. But the trust is very plain: it is a trust for the benefit only of such creditors as shall execute the deed within twenty-eight days from the date. It is a form of trust, therefore, which entirely takes the case out of the reach of those decisions which have held that the proviso requiring the creditors to come in within a certain time would not, if objected to, avail the petitioning-creditor who has not executed the deed, because it confines the benefit of the deed to that class of creditors who shall come in within that period of twenty-eight days." In Ex parte Rawlings, the *decision* was, that the deed had not been executed by *109] the requisite number *of creditors: but Lord Justice Turner throws out a suggestion,—in accordance to that of Bramwell, B., in Walter *v.* Adcock, 7 Hurlst. & N. 541,—that the words of the 192d section "between a debtor and his creditors," refer to *all* the creditors. The Lord Justice Turner again goes into that question in Ex parte Godden, In re Shettle. As to the third ground of objection stated in the rule,—the saving of the rights as against third parties,—the deed in Ex parte Godden contained the same provision, and no objection was made to it on that ground. That execution would be sufficient, without the amount of the debt appearing against the party's signature in the schedule, is clear from Harrhy *v.* Wall, 1 B. & Ald. 103.

Holl, contrà, was not called upon.

ERLE, C. J.—I am of opinion that this rule must be made absolute, the deed in question not being a deed available for the defendant against a non-executing creditor, within the 192d section of the Bankruptcy Act, 1861. It is a deed which is made between Castrique, the debtor, of the first part, and the several other persons, creditors of

Castrique, whose names and seals are thereto subscribed and affixed, of the second part. It recites, that Castrique is indebted to the several parties thereto of the second part in the several sums of money set opposite their respective names in the schedule thereunder written; that, being unable to pay his *said* debts in full, he has proposed to his *said* creditors to pay them a composition of 2*s.* 6*d.* in the pound within a month; and that the said creditors parties thereto of the second part have agreed to accept the composition, and covenant to release the debtor on his paying or tendering the composition. Then comes a saving to the said creditors respectively *of their rights (if any) against third parties, and a proviso that [*110 the deed shall be void unless the composition is paid or tendered within a month from the date and execution of the deed by Castrique. I do not think it necessary now to go into the principle upon which the cases have been decided. It seems to me that the matter is disposed of by the recent cases in the Court of Chancery. I take the statement of the law by Lord Justice Turner in Ex parte Rawlings, 32 Law J., Bankruptcy, 27, to be correct and directly in point, viz. that, to constitute the instrument a valid deed of composition within the 192d section of the recent statute, it must extend to all the creditors. And that statement of the law is repeated in the subsequent case of Ex parte Godden, In re Shettle, 32 Law J., Bankruptcy, 37, before the Lords Justices; and received the sanction of the Lord Chancellor in Ex parte Morgan, In re Woodhouse, 32 Law J., Bankruptcy, 15. And in Walter *v.* Adcock, 7 Hurlst. & N. 541, the Court of Exchequer held a deed in this form not to be valid. To satisfy the 192d section, the deed must be made with all the creditors, or so as to enable all the creditors to avail themselves of it; and it must be a valid deed at the time of its execution. The authorities I have referred to satisfy me that this is not a deed within the 192d section. I feel indebted to Mr. Trevelyan for having brought to our attention matter which is very interesting, though it operates nothing upon the case in hand. Lord Holt, in the course of a discussion upon a statute containing a very similar provision, throws out an opinion which seems rather adverse to the opinions of Lord Justice Turner and of the Lord Chancellor in the cases cited: but that is not sufficient to control the deliberate decisions of those very learned judges.

WILLES, J.—I am entirely of the same opinion.

*BYLES, J.—I think we are concluded by the equity cases [*111 which have been referred to.

KEATING, J., concurred. Rule absolute.

HODGSON, Appellant; LITTLE, Respondent. *April* 29.

A "fishing mill-dam" is a "fishery" within the meaning of the 20th section of "The Salmon Fishery Act, 1861," 24 & 25 Vict. c. 109.

The proprietor or occupier of a "fishing mill-dam" on a salmon river is bound during the close season to remove all obstructions to the free passage of fish up the stream, even though he has ceased to use the dam for the purpose of fishing.

THIS was a case stated for the opinion of the court pursuant to the statute 20 & 21 Vict. c. 43.

At a petty sessions holden at Darlington, in the county of Durham, on the 20th of October, 1862, an information preferred by Robert Little (hereinafter called the respondent) against Joseph Hodgson (hereinafter called the appellant) under s. 20 of The Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), charging for that, on the 8th of September last, at the township of Dinsdale, in the said county of Durham, he the said appellant, then being the occupier of a certain fishery for salmon in the river Tees, did not within thirty-six hours after the commencement of the close season, as fixed by the Salmon Fishery Act, 1861, cause to be removed and carried away from the waters within his fishery the inscales, hecks, tops, and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery, and in such default for the space of, to wit, fourteen days did continue, contrary to the form of the statute in such case made and provided,—was heard and determined by the justices, the said parties respectively being then present: and upon such hearing the appellant
*112] *was convicted before the justices of the said offence; and they adjudged him to forfeit all the engines and other things, to wit, the lock-sluices, gates, or doors that were not removed and carried away in compliance with the said section, and for every day, to wit, fourteen days, during which he had suffered such things to remain unremoved beyond the period prescribed by the said act, to pay the sum of 1*l.*, and also to pay to the respondent the sum of 5*l.* 13*s.* for his costs in that behalf.

Upon the hearing of the said information, it was proved, that, during the times hereinafter mentioned, the appellant was a corn-miller, occupying as tenant and for the purposes of his business a corn-mill close by the fish-locks hereinafter mentioned; that the fishing mill-dam and locks hereinafter mentioned were used for the double purposes of fishing and of supplying water for the purposes of the said mill; that the Dinsdale fishing mill-dam extends across the river Tees, and is of such height, that, when the river is in an ordinary state, salmon passing up the river can rarely, if ever, leap over it, and are frequently seen attempting to do so in vain; and that, at the end of the dam on the Durham shore, there is an opening through it, which is locally termed a fish-lock. It was also proved, that, on the up-stream side of the fish-lock, two grooved openings of the width of about three feet each are formed. In the grooves of each of these openings a movable sliding-door formed of wood and iron is placed, which can be raised or lowered in the grooves at pleasure. When these doors are down, as it is proved they were on the said 8th of September last, and on thirteen subsequent week days, no salmon can pass through the fish-lock. Within the lock, and at a distance of about three feet from the sliding-door, and down the stream, another
*113] frame is *placed, in which when the fish-lock was used for taking salmon, hecks were placed, the doors above being opened. It was proved that these hecks had been used by the appellant during the last fishing season, up to the 19th of May last, when they were removed: but that, on the 8th of September, and on the said thirteen subsequent days, the doors were neither removed nor

drawn up out of the water, and consequently an impassable obstruction was presented to the free passage of salmon through the lock. It was also proved that a similar fish-lock, with similar grooves, doors, and hecks, existed at the Yorkshire end of the dam; and that the circumstances already described with reference to the lock at the Durham end of the dam were equally applicable to this.

It was proved that the locks in question were used by the appellant for taking salmon during the last fishing season and up to the 19th day of May last, when he discontinued using them by an order from his landlord's agent, and upon the representations of the inspectors of salmon fisheries that the locks were not in accordance with law; and that they still remained in the same state as they were when so used, except that the hecks had been taken out, but no proof was given that the locks had been actually used for the purpose of catching fish after the said 19th day of May; and that what had not been removed were the doors above described. It was also proved that locks and cruives were synonymous terms.

For the appellant it was contended, that the lock was not on the 8th of September or other subsequent days a fishery for salmon, or a crib. box, or cruive within the meaning of the section under which the information was laid; and that it was a fishing mill-dam, not used for fishing, but for the purposes of the *mill only after the said 19th of May,—the use of which was regulated by other sections of the act. [*114

It was also contended on behalf of the appellant, that the appellant, if otherwise liable to penalties under the said 20th section, was not so, inasmuch as the removal of the doors would injure the milling power.

An objection was also taken that there was no legal evidence adduced before the justices that the appellant was the occupier of a fishery.

In addition to the before-mentioned proof that the defendant was a corn-miller and occupied the said mill for the purposes of his business, it was proved that he was the occupier of and used the said locks for the purpose of taking salmon until the said 19th day of May last as aforesaid; and that he had since fished with nets in the adjoining waters of the river Tees both above and below the dam. And it was stated by a witness, that, as such occupier, the appellant had been summoned before the magistrates in petty sessions at Darlington on the 1st of September last, under the 22d section of the Salmon Fishery Act, and convicted in the penalty of 2*l.* and costs, which had since been paid.

This last-mentioned evidence was objected to on behalf of the appellant as illegal and insufficient; but no such conviction was put in evidence.

The witness also stated, that, when he spoke to the appellant about not complying with the 20th section of the act, the appellant did not deny that he was the occupier, but merely said, that if he kept the sluices or doors up, the mill would be of no use to him, as his milling power would be gone.

It transpired that the appellant held under a lease; and it was proved that due notice to produce had been given to him. On the

*115] hearing, his attorney did not *produce it, and thereupon the agent of the owner of the mill and fishery was called upon his subpœna duces tecum to produce the lease. He stated that there was a lease, two parts of which were executed, one being handed to the appellant and the other had been in his (witness's) custody as the agent of the owner; but that a short time ago, at the request of the attorney of the owner, he had delivered it to him, and it had not been returned to witness. The witness then gave secondary evidence that the appellant was the occupier of the mill and fishery for seven years from May Day, 1860, at a rental of 120*l.* a year, and as such tenant had used the fish-locks up to the 19th of May last for the purpose of catching salmon.

The appellant's attorney objected to this secondary evidence, and contended that the respondent, not having subpœnaed the owner of the premises, in whose custody the law would presume the lease to be, had not done all in his power to produce the best evidence. The respondent's attorney contended that there was sufficient evidence of occupation for the purpose of the case without the lease; that the lease itself would be in the custody of the appellant; and that, as he had failed to produce it in compliance with proper notice, the evidence given of its contents was the best he could adduce, and was admissible.

A further objection was taken by the appellant, that the fish-locks and doors were part of the freehold; that the appellant could not legally remove them; and that, to do so, the appellant would injure his landlord's property, and therefore was not liable to the penalty imposed by the 20th section.

The justices, being of opinion that the evidence given before them as aforesaid proved that the appellant was the occupier of the fishery, and that the case was within the operation of the said twentieth sec-

*116] tion *of the Salmon Fishery Act, 1861, gave their determination against the appellant in manner before stated.

If the court should be of opinion that the conviction was legally and properly made, and that the appellant was liable as aforesaid, then the conviction was to stand; but, if the court should be of opinion otherwise, then the information was to be dismissed.

Manisty, Q. C., for the appellant.(*a*)—It appears that the appellant is the occupier of a mill and of a dam extending from the Durham to the Yorkshire side of the river Tees, but that he had by order of his landlord abandoned the use of the dam for fishing purposes since

(*a*) The points marked for argument on the part of the appellant were as follows:—

"That it was not shown that at the time in respect of which the conviction was made there was any fishery for salmon within the meaning of the statute,—that it appeared, on the contrary, that there was not at that time any such fishery,—that the appellant was not shown to have been the occupier of a salmon-fishery, if there were any such,—that no proper evidence of the alleged occupation was received,—that evidence of an alleged previous summons and conviction was improperly received, and that, if those matters were admissible at all, verbal evidence ought not to have been allowed,—that it did not appear that the appellant was entitled to or could remove or carry away the doors mentioned in the conviction, and that the evidence showed the contrary,—that the locks were not cruives, cribs, or boxes, and the doors were not obstructions or matters required by the act to be removed and carried away,—that the forfeiture of doors not the property of the appellant was illegal,—that it appeared that the removal of the doors would have injured the milling power of the corn-mill, and therefore that the conviction was improper."

the 19th of May, 1862: and the question is whether he has been guilty of a violation of the Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, by keeping *his sluices closed during the close season, [*117 or whether he is bound to forego the benefit of the water for his mill from September to February. By the interpretation clause of the act, s. 4, it is provided that "*Dam* shall mean all weirs and other fixed obstructions used for the purpose of damming up water;" that "*Fishing weir* shall mean a dam used for the exclusive purpose of catching or facilitating the catching of fish;" and that "*Fishing mill-dam* shall mean a dam used or intended to be used partly for the purpose of catching or facilitating the catching of fish, and partly for the purpose of supplying water for milling or other purposes." The 12th section, which provides regulations to be observed with respect to "dams," enacts that "no dam except such fishing-weirs and fishing mill-dams as are lawfully in use at the time of the passing of this act by virtue of a grant or charter or immemorial usage, shall be used for the purpose of catching or facilitating the catching of salmon:" and, after imposing certain penalties and forfeitures, it proceeds to enact that "no fishing-weir, although lawfully in use as aforesaid, shall be used for the purpose of catching salmon, unless it have therein such free gap as is hereinafter mentioned; and no fishing mill-dam, although lawfully in use as aforesaid, shall be used for the purposes of catching salmon, unless it have attached thereto a fish-pass of such form and dimensions as shall be approved of by the Home Office, nor unless such fish-pass has constantly running through it such a flow of water as will enable salmon to pass up and down such pass, but so nevertheless that such pass shall not be larger nor deeper than requisite for the above purposes." If the dam in question is only used for milling purposes, the appellant is clearly not within that section. Close time is fixed by s. 17, from the 1st of September to the 1st of February; with *power to the Home [*118 Office, by s. 18, to extend or vary it. And the 20th section, upon which this conviction is founded, enacts that "the proprietor or occupier of every fishery for salmon shall, within thirty-six hours after the commencement of the close season, cause to be removed and carried away from the waters within his fishery the inscales, hecks, tops, and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery; and, if any proprietor or occupier omits to remove and carry away in manner aforesaid any things hereby required to be removed and carried away, he shall incur the following penalties, that is to say,—1. He shall forfeit all the engines or other things that are not removed and carried away in compliance with this section,—2. He shall, for every day during which he suffers such things to remain unremoved beyond the period prescribed by this act, pay a sum not exceeding 10*l*." The 23d section provides that "any proprietor of a fishery, with the written consent of the Home Office, may attach to every dam existing at the time of the passing of this act a fish-pass, of such form and dimensions as the Home Office may approve, so that no injury be done to the milling power or to the supply of water to or of any navigable river, canal, or other

inland navigation by such fish-pass," &c. Further protection to milling power is given by s. 26, which enacts, that, "where a fish-pass is attached to any dam in pursuance of this act, the sluices, if any, for drawing off the water which would otherwise flow over the dam shall be kept shut at all times when the water is not required for milling purposes, in such manner as to cause such water to flow through the
*119] fish-pass; and any person making default in *complying with the requisitions of this section shall incur a penalty not exceeding 5*s.* per hour for every hour during which such default continues; but this section shall not preclude any person from opening a sluice for the purpose of letting off water in cases of flood, or for milling purposes, or when necessary for the purposes of navigation, or for cleaning or repairing any dam or mill, or the appurtenances thereof." And then follow provisions as to fishing weirs and fishing mill-dams. Since the 19th of May, 1862, when the hecks were removed, this structure ceased to be a fishing mill-dam, and became a dam simpliciter. At all events, it is submitted that the conviction is bad for not specifically pointing out what it is that the appellant is required to remove. [ERLE, C. J.—As far as I can see, the statute would have been complied with if a free passage had been left for the fish through the lock.]

Davison (with whom was *Fowler*), for the respondent.—The object of the statute was, to provide, that, in all rivers where salmon are found, there shall during the close season be kept a free passage for fish to the spawning-grounds. The facts disclosed in this case show that this is a fishery, and not merely a fishing mill-dam. The things sought by the conviction to be removed, viz. the lock-sluices, gates, or doors, are not less part of the fishery than are the hecks or any other of the contrivances mentioned in the statute. There is nothing stated in the case which shows that any injury will be done to the appellant's mill by the removal of these obstructions. The facts clearly bring the case within the 20th section of the act.

Manisty, in reply.—Any owner of a fishery who conceives that
*120] the appellant's dam obstructs his rights *may apply to the Home Office, under s. 23, for leave to insert therein a fish-pass. There is nothing on the face of the case to show that the appellant has been guilty of any infraction of the statute.

ERLE, C. J.—In this case the appellant, who is the occupier of a mill and a fishing mill-dam and fishery on the river Tees, has been convicted under the 20th section of the Salmon Fishery Act, 1861, 24 & 25 Vict. c. 109, for not removing from the fishing mill-dam certain obstructions to the free passage of fish through the cruives, cribs, and boxes within his fishery. The 20th section of the act provides that "the proprietor or occupier of every fishery for salmon shall, within thirty-six hours after the commencement of the close season, cause to be removed and carried away from the waters within his fishery the inscales, hecks, tops, and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery;" and it imposes certain penalties for omission so to do. It seems to me that the conviction applies directly to the words of that section. The

evidence set out in the case shows that there had been a contrivance by means of hatches and hecks for the taking of fish, and that, although the hecks had been removed, the hatches or sluices remained. This apparatus, it seems, was in use for the taking of salmon down to the 19th of May last. The hecks were then taken away: but the appellant has kept down the lock-sluices or doors: and it is found as a fact that no fish, except those which are particularly active, can pass over the dam to go up the stream. It appears to me to be perfectly clear that the object of the legislature was to secure a free passage for the fish to the *spawning-ground. The 23d section pro- [*121
vides that any proprietor of a fishery, with the consent of the Home Office, may attach a fish-pass to every dam existing at the time of the passing of the act: and the 25th section provides that "every person who, after the passing of the act, in waters where salmon are found, constructs a new dam, or raises or alters, so as to create increased obstruction to fish, a dam already constructed, shall attach and maintain attached thereto in an efficient state a fish-pass of such form and dimensions as may be determined by the Home Office." The appellant insists, that, because he has taken away part of the apparatus formerly used for catching fish, the structure which remains is a mere mill-dam, and therefore not within the 20th section of the act. The justices have convicted him in a penalty, and the conviction goes on to adjudge a forfeiture of the obstruction, viz. the lock-sluices, gates, or doors. The main question to be tried, was, the right of the appellant to intercept the free passage of the fish. So far, I am of opinion that the conviction was clearly right: and I do not think it necessary to analyze its form.

WILLES, J.—I am of the same opinion. The substantial question is, whether the sluice-gates which have been allowed to remain in the appellant's fishing mill-dam, and which obstruct the passage of the salmon up the stream, constitute an obstruction in a fishery? The legislature gives no definition of a "fishery." It cannot mean an incorporeal hereditament. Then, does it apply to a contrivance which with little trouble and expense can be put into a state to be capable of catching fish? I apprehend it does. The 20th section enacts that the proprietor or occupier of every fishery for salmon shall, within thirty-six hours after the commencement of the close season, cause to be removed *and carried away from the waters within his [*122
fishery the inscales, hecks, tops, and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, *and all other obstructions to the free passage of fish* in or through the cruives, cribs, and boxes within his fishery," under certain penalties. He is to remove all obstructions which may prevent the fish from going up the stream, and which form part of the contrivance for catching them. Are those things which the appellant is by the conviction required to remove, part of such contrivance? Clearly they are. The 22d section shows that these things are to be removed during close season, "whether used for the purpose of fishing or not." The expressions used in that and in the 20th section are evidently intended to be synonymous. Mr. Manisty has suggested a difficulty arising from the fact that this is a proceeding against the occupier of the mill and mill-dam only, whereas the things directed

to be removed belong to the landlord. I do not think there will be any difficulty in dealing with that. The forfeiture of the sluice-gates, &c., of course is not the object of those who institute these proceedings. I agree with my Lord that the conviction is right.

BYLES, J.—I also am of opinion that the conviction in substance is perfectly right. The act is a remedial one, and its object is to prevent injury to the salmon fisheries and to increase the supply of salmon. Its provisions are intended to apply to all tidal and inland waters where salmon are found; and the main object is, to insure the free passage of fish all up the stream. It is our duty so to construe it as to suppress the mischief and advance the remedy. Looking at the evidence set out on the case, it is clear that when these sluices are down they form a complete obstruction to *all access up the river. If that which the appellant occupies is not a fishery within the act, the case falls within either the 23d or the 25th section: the appellant is either constructing a new dam or altering an old one so as to cause an increased obstruction. He is bound, therefore, to leave a sufficient fish-pass. I agree that "fishery" in s. 20 comprehends a fixed apparatus for taking fish: and here was a complete fixed apparatus for fishing used for that purpose as late as the 19th of May, since when a part of it, viz., the hecks, has been removed. But there has been no formal or final abandonment of the fishery. It may be used again for taking fish to-morrow. I think, therefore, the structure is rightly treated in the case as a "fishing mill-dam." What is it that is required to be done? The proprietor or occupier is to cause to be removed and carried away from the waters within his fishery "the inscales, hecks, tops, and rails of all cruives, boxes, or cribs, and all planks and temporary fixtures used for taking or killing salmon, and all other obstructions to the free passage of fish in or through the cruives, cribs, and boxes within his fishery." The things which now obstruct the free passage of the fish are the sluices. The magistrates have ordered all obstructions to be removed. But the moment the proprietor of the fishery maks a sufficient pass for the fish in his fishing mill-dam, the purposes of the act are answered, and the requisitions of the conviction satisfied. I have great doubt whether the conviction, if drawn up in the form in which it now stands, would not be good. But, at all events, I have no doubt that the appellant was properly convicted under the 20th section of the act.

*123]

KEATING, J.—I am of the same opinion. I think this was clearly a "fishery" within the 20th section of the *act. If so, the only question which remains, is, whether the case shows that the free passage of fish through this fishing mill-dam has been obstructed. I think it does. Conviction affirmed, with costs.

*124]

WARMBY, Appellant; DEAKIN, Respondent. *April* 27.

The 1st section of the Turnpike Amendment Act, 1 & 2 W. 4, c. 25, enacts that "no toll shall be demanded or taken for any horse, sheep, or other beast or cattle going to or from water or pasture, &c., and passing on any turnpike-road, provided that such horse, &c., do not pass upon such turnpike-road more than the space of two miles in going to or returning from water or pasture."

A., who carried on the business of a farmer and cattle-dealer, had two pasture-fields, one on each side of a toll-bar. Having purchased beasts and sheep at a market, he drove them to the one pasture, and, after keeping them there a day, drove them through the toll-bar to the other pasture, *intending the next day to send them to another market on that side of the bar, for sale.* The distance between the two pastures along the turnpike-road was less than two miles:—

Held, that the animals were exempt from toll.

THIS was a case stated pursuant to 20 & 21 Vict. c. 43, for the opinion of this court:—

At a petty session of the peace holden at Rotherham, in the west riding of the county of York, on the 9th of June, 1862, before two justices acting in and for the said riding, an information preferred by Samuel Deakin (hereinafter called the respondent), against William Warmby (hereinafter called the appellant), under the 4 G. 4, c. 95, ss. 30, 50, charging that the appellant, on the 11th of May, 1862, at the parish of Rotherham, in the said riding, then being the collector of the tolls at a certain gate there called Broom Bar, on a certain turnpike-road there situate called the Rotherham and Barnby Moor turnpike-road, did then and there demand and take from the respondent 5*d.* as and for the toll of seven beasts and seven sheep of which the respondent was then and there the driver on the said turnpike-road, the respondent being then and there exempt from the payment of such toll by reason of the said beasts and sheep being then and there driven from pasture and to pasture, and not passing upon such turnpike-road more than two miles, and the respondent *then and there claiming the said exemption,—was duly heard and [*125 determined by the justices, and they convicted the appellant and adjudged him to forfeit and pay the sum of 5*l.* and costs.

It was proved by the respondent that he occupies nearly one hundred and twenty acres of land in the parish of Whiston, and that he also occupies a pasture field called the Broom Bar Field and another pasture field called the Badsley Moor Field; that the Badsley Moor Field is on the Rotherham side of the toll-gate called Broom Bar on the Rotherham and Barnby Moor turnpike-road, and that all his other fields are on the other or Whiston side of the said toll-gate, and, except one, are distant from such field more than a mile; that, on Friday, the 9th of May last, he sent seven beasts from the Masbrough station to the Broom Bar Field, passing through the Broom Bar, travelling only nine hundred and sixty yards on the turnpike-road; and that, on the following day, he sent seven sheep from the Kiveton Park station, which had come from Lincoln market, to the same field, not passing through the Broom Bar; that, on the 11th of May, the Sunday and day following, the respondent removed the beasts and sheep from the Broom Bar Field to the Badsley Moor Field, from one pasture to another; that, in going from the Broom Bar Field to the Badsley Moor Field, they would travel from two hundred to three hundred yards on the turnpike-road, and would

have to pass through the said Broom Bar toll-gate, of which the appellant is collector; that the appellant closed the gate, and refused to let the beasts and sheep through without payment of 5*d.* toll; that the respondent claimed exemption on the ground that they had not travelled two miles, and that he was taking them to pasture; that the appellant would not allow them to pass through without payment
*126] of the toll, and *that the respondent paid him; that, on the Monday following, the beasts and sheep were taken to the Rotherham market for the purpose of being sold (except one); and that they were all sold except that one.

On cross-examination by the appellant's solicitor, the respondent said he was a cattle-dealer as well as a farmer; that he bought the seven beasts at Epworth fair, and sent them to the Broom Bar Field; that they belonged to himself and his brother, who were partners in the land as well as cattle-dealers; that part of the beasts were bought purposely to sell at the Rotherham market or elsewhere; that the beasts were all the better for being taken to the Badsley Moor Field, as they would go fresher to market; that he keeps the Badsley Moor Field a fresher pasture in order to send his cattle fresh to market; and that his object was not to save the toll.

On re-examination the respondent said, that, if he had taken the beasts and sheep from the Broom Bar Field to the market he should have claimed exemption on passing through the gate, as they would not have travelled two miles on the road.

The 1 & 2 W. 4, c. 25, s. 1, enacts "that no toll shall be demanded or taken for or in respect of any horse, ass, sheep, swine, or other beast or cattle of any kind going to or from water or pasture, or to or from being shoed or farried, and passing on any turnpike-road, provided that such horse, ass, sheep, swine, or other beast or cattle of any kind, do not pass upon such turnpike-road more than the space of two miles going to or returning from water or pasture, or to or from being shoed or farried."

It was contended on behalf of the respondent, that the beasts and sheep were exempt from toll, on the ground that they were going to
*127] pasture and from *pasture, and did not pass two miles on the turnpike-road.

It was contended, on behalf of the appellant, that the beasts and sheep were not exempt; that their removal on the Sunday from one field to another was a mere trick to evade payment of the toll, under the colour of taking them from one field to the other, intending thereby to avoid liability to toll in taking them to market,—the two fields being distant a mile or more from the respondent's farm at Whiston; that, in fact, the beasts and sheep were on their way from Epworth fair and Lincoln market to Rotherham market for the purpose of sale, and in the way of the respondent's dealing as a cattle-dealer, and not as a farmer; that they were not going to or from pasture, within the meaning of the act; and that the exemption was intended solely in favour of agriculture and parties living in the locality of toll-gates requiring constant communication with pasturing cattle, and did not apply to a cattle-dealer who might for the purpose of avoiding toll rent pasture fields on each side of the toll-bars, and so remove his sheep from one market to another without payment of toll.

The justices, being of opinion that the sheep and beasts were exempt from toll, convicted the appellant as before stated: whereupon the opinion of the Court of Common Pleas is asked, whether or not they were correct in their determination, and as to what further should be done or ordered in the premises.

Cleasby, Q. C., for the appellant.(a)—The 32d *section of the General Turnpike Act, 3 G. 4, c. 126, enacted that no toll should [*128 be demanded or taken for, amongst other things, "any horses or other beasts *employed in husbandry* going to or returning from plough or harrow, or *to or from pasture or watering* *place, or going to or [*129 returning from being shoed or farried, such horses or beasts not going or returning on those occasions more than two miles on the turnpike-road on which the exemption shall be claimed." By the 1st section of the 1 & 2 W. 4, c. 25, reciting that doubts were entertained whether under the provisions of the above-mentioned act, and of several other acts amending the same, "cattle going to or from water or pasture, and passing on such turnpike-roads, or from being shoed or farried, are exempted from tolls," enacts "that no toll shall be demanded or taken for or in respect of any horse, ass, sheep, swine, or other beast or cattle of any kind going to or from water or pasture, or to or from being shoed or farried, and passing on any turnpike-road, provided that such horse, &c., do not pass upon such turnpike-road more than the space of two miles, going to or returning from water or pasture, or to or from being shoed or farried." That evidently applies to the purpose, and not to the place: the object

(a) The points marked for argument on the part of the appellant were as follows:—

"1. That, under the statute 1 & 2 W. 4, c. 25, the cattle the subject of the toll were not being driven from pasture to pasture through the toll-bar on the Rotherham and Barnby Moor turnpike-road on the 11th of May, 1862, but were driven from one close to another to evade the toll on going from Epworth fair and Lincoln market to Rotherham market, being taken to the Broom Bar close on the 9th and 10th, and removed on the 11th, and sold in the market on the 12th, without having either come from or being taken to the respondent's farm:

"2. That, the respondent being a cattle-dealer and salesman by commission, the cattle were not in his use as agricultural cattle, but as articles of trade, and were put in the Broom Bar close for the night and taken through the toll-bar to the Badsley Moor close for the following night on the plea of going from pasture to pasture, but for the sole purpose that on the Monday, the market-day at Rotherham, they might be removed to the market without going through the bar and without paying toll:

"3. That the plea for removing such cattle from pasture to pasture that the same might be fresher, is only an excuse, the Broom Bar close being larger than the Badsley Moor close, and nearer to the market by about one hundred yards, and one night being too little time to produce any manifest improvement in them:

"4. That the cattle the subject of toll were never taken to the respondent's farm, although such farm lies on the direct road from Kiveton station to Rotherham market, but were taken a circuitous route to the Broom Bar close to be removed, on the plea of changing pasture, on the Sunday ready for market; and that, as such, the appellant was legally justified in demanding toll for the same passing through the said bar:

"5. That the exemption claimed for cattle using these two closes by persons in the capacity or business of the respondent, is against the spirit of the 1 & 2 W. 4, c. 25:

"6. That such cattle were going from one market to another; and that the exemption allowed by the said act was intended solely in favour of agriculture and parties living in the immediate vicinity of toll-gates, requiring constant communication with their cattle and the pastures in which such cattle were fed or maintained:

"7. That the cattle in question were not the entire property of the respondent, but in his possession for the purpose of sale, and were taken to his land for the purpose of avoiding toll:

"8. That the respondent rents these pasture fields on each side of the toll-bar for the express purpose of avoiding toll, under the plea of going from pasture to pasture, though the cattle are actually passing from one market to another."

of the statute being to relieve the farmer from the obligation of paying toll every time his cattle or sheep are driven through a turnpike-gate in passing from one part of his land to another for the purpose of watering or depasturing, or to or from the farm to the farriery.

*130] [Willes, J.—The only difference *between the two enactments is, that, in the later one, the words "employed in husbandry" are omitted,—making the exemption general.] The question is, whether a man having two fields, one on each side of the turnpike-gate, may evade the toll on cattle or sheep passing from market to market, by resting them for a night in the one pasture, and driving them the next day to the other. [Erle, C. J.—Can we say that they are the less going to pasture, because the owner has the intention of sending them to market on the following day?] It is submitted that that which gives the exemption is, the act of pasturing the sheep or cattle in the ordinary cultivation and use of the land, and not the mere using the field as a temporary resting place in the prosecution of the party's business of a cattle-dealer.

Welsby, for the respondent, was not called upon.(*a*)

*131] *Erle, C. J.—I am of opinion that the appellant in this case was properly convicted. It appears that the respondent has two pasture-fields one on each side of Broom Bar, that certain beasts and sheep belonging to him having pastured for a short time in one of the fields were going to pasture in the other, when the appellant demanded toll, contending that the removal of the animals from the one pasture to the other was for the mere purpose of evading toll, they not going bonâ fide to pasture, but being passed onwards to Rotherham market. Now, the 1 & 2 W. 4, c. 25, s. 1, enacts that "no toll shall be demanded or taken for or in respect of any horse, sheep, or cattle going to or from water or pasture, and passing on any turnpike-road, provided that such horse, &c., do not pass upon such turnpike-road more than two miles." The beasts and sheep in question certainly were going from pasture to pasture, and therefore fall plainly within the exempting words. It is said that the respondent is not entitled to claim the exemption, because the beasts and sheep came into his possession in his character of cattle-dealer, he having bought the sheep at Lincoln market and the beasts at Epworth fair, and intending to send them on for sale at Rotherham market. It seems to me that the 1 & 2 W. 4, c. 25, was passed purposely to get

(*a*) The points marked for argument on the part of the respondent were as follows:—

"1. That the beasts and sheep for which toll was taken by the appellant from the respondent were (as is stated in the case to have been proved) being removed by the respondent from one pasture to another in order to freshen or benefit them, and not for the purpose of saving the toll; and that, as they did not pass upon the turnpike-road two miles, they were, under the 1 & 2 W. 4, c. 25, s. 1, exempt from toll:

"2. That the clause giving this exemption is to receive a liberal construction; and the words are sufficiently large and comprehensive to extend to this case:

"3. That the appellant's contention, that the removal of the beasts and sheep from one field to another was a mere trick to evade payment of toll, is without proof and without foundation; because, if the respondent had taken the beasts and sheep direct from the Broom pasture to the Rotherham market, they would only have passed 960 yards upon the turnpike-road (as appeared by a plan attached to the case); and, if his object had been to save toll upon the seven beasts, he could have placed them in the Badsley Moor pasture in the first instance, in which case they would not have passed through the bar at all:

"4 That it is a fact which should have appeared upon the case, that, from the beginning to the end of their journeys, neither beasts nor sheep travelled two miles upon the road in question."

rid of the doubtful construction caused by the conditions by which the former provision had been hampered. It contains plain words of exemption free from any qualification; and we can only give those words their *plain and obvious construction. The two trades [*132
of farmer and cattle-dealer we all know are frequently blended. This respondent carried on both: and, although he had purchased the beasts and sheep at one fair or market and intended on the following day to drive them to another market, I see nothing in the act to deprive him of the exemption he claimed, nothing to limit the depasturing to the abiding place of the cattle

The rest of the court concurring,

Judgment for the respondent, with costs.

NORTH and Others, Assignees of EDWARD STAFF PRIOR and ALFRED STAFF PRIOR, Bankrupts, *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY. *April* 22.

By the 166th section of the South Western Railway Act, 4 & 5 W. 4, c. lxxviii., the tolls authorized by the act were to be paid to such persons, at such places upon or near the railway, and in such manner as the directors should, by notice to be annexed to the list of tolls, appoint; and, in case of refusal or neglect, *on demand*, to pay such tolls, *the person to whom the tolls ought to have been paid* is empowered to seize the goods for or in respect of which such tolls ought to have been paid, or any other goods belonging to the party which shall pass on or along the railway, and detain the same until payment of the tolls and charges; and, if the goods are not redeemed within five days, the same shall be *appraised* and sold, and such tolls and charges satisfied thereout, as the law directs in cases of distress for rent:—

Held, that, where the company seized and sold without complying with these several conditions,—no demand of the tolls having been made, and the seizure not having been made by "the person to whom the tolls ought to have been paid," and the sale having taken place without an appraisement,—they became trespassers ab initio.

THIS was a special case, stated by consent under the provisions of the Common Law Procedure Act, 1852.

The first count of the declaration stated, that, before the said E. S. Prior and A. S. Prior became bankrupts, in consideration respectively that the said E. S. Prior and A. S. Prior would on different occasions deliver to the defendants certain goods, to wit, certain quantities of coal, to be by the defendants carried from the Nine *Elms sta- [*133
tion, Battersea, to Alton, certain other quantities to be by the defendants carried from the said station to Milford, &c., &c., certain other quantities to be by the defendants carried from the Brentford station of the defendants to Chertsey, certain other quantities to be by the defendants carried from the last-mentioned station to Redbridge, &c., &c., respectively, the said several quantities to be at the said places respectively delivered for the said E. S. Prior and A. S. Prior for reward to the defendants, the defendants, on the said occasions respectively, promised the said E. S. Prior and A. S. Prior to carry the said goods respectively from the said Nine Elms station to Alton, to Milford, &c., &c., aforesaid respectively, and from the said Brentford station to Chertsey, to Redbridge, &c., &c., aforesaid respectively, and to deliver the same at the said places respectively for the said E. S. Prior and A. S. Prior; that the said E. S. Prior and A. S. Prior, before their bankruptcy, delivered the said goods to the defendants

on several occasions, and the defendants had and received the same respectively on the said occasions, for the respective considerations and purposes and on the terms aforesaid; and that all things happened, and all conditions were fulfilled, and all periods of time elapsed, necessary to entitle the said E. S. Prior and A. S. Prior before their bankruptcy, and the plaintiffs as assignees as aforesaid since, to claim the performance of the said several contracts, and to entitle the plaintiffs as assignees as aforesaid to maintain this action: yet that the defendants did not carry and deliver the said goods respectively, or any of them, for the said E. S. Prior and A. S. Prior as aforesaid, or for the plaintiffs as assignees as aforesaid, according to their said promises in that behalf but wrongfully kept, seized, and took possession
*134] of the said goods respectively, and, after the said bankruptcy, *wrongfully sold the same, whereby the said E. S. Prior and A. S. Prior, and the plaintiffs as assignees as aforesaid, had wholly lost the said goods and the value thereof.

The second count stated, that, before the said bankruptcy, and after the passing of an act of parliament made in the session of parliament holden in the 4th and 5th years of the reign of His late Majesty King William the 4th (c. lxxxviii.), being "An Act for making a Railway from London to Southampton," the defendants had carried on their railway for the said E. S. Prior and A. S. Prior certain goods, to wit, quantities of coal, for certain rates and tolls to be paid to the defendants by the said E. S. Prior and A. S. Prior in that behalf, and certain other goods, to wit, other large quantities of coal, the property of the said E. S. Prior and A. S. Prior, then were passing on or along the said railway of the defendants; whereupon the defendants, claiming to exercise the powers given to them by the said statute with reference to the seizure and sale of goods in respect of tolls due and unpaid, seized the said last-mentioned goods of the said E. S. Prior and A. S. Prior, and, after the said bankruptcy, wrongfully sold the said goods without having the same or any part thereof appraised as the law directs in cases of distress for rent; whereby the said goods were improperly sold for less price than otherwise might have been obtained for the same, to the damage of the plaintiffs as assignees as aforesaid.

There were also counts for the wrongful conversion of goods, to wit, large quantities of coal, and divers railway wagons and trucks of the Priors and of the plaintiffs as assignees; and also the money counts.

The defendants pleaded—first, except as to the common counts, not guilty,—secondly, to the first count, that they did not promise as
*135] alleged,—thirdly, to the first *count, that the said E. S. Prior and A. S. Prior did not deliver the said goods to the defendants, nor did they receive the same, as alleged,—fourthly, to the first count, that the defendants had carried the said goods, and also certain other goods which had been before then removed from the defendants' premises, along the defendants' railway for the said E. S. Prior and A. S. Prior, and tolls had become due from the said E. S. Prior and A. S. Prior to the defendants in respect of the said carriage and goods, which had been duly demanded by the defendants of the said E. S. Prior and A. S. Prior, but which said tolls the said E. S. Prior and A. S. Prior and the plaintiffs failed to pay, wherefore the defend-

ants did as in the said count complained of, and, the said goods not being redeemed within five days next after the taking thereof, the defendants sold the said goods to pay for the said tolls so due as aforesaid, as they well might,—fifthly and sixthly, to the third and fourth counts, that the said goods were not, nor was any of them, the goods of the said E. S. Prior and A. S. Prior, as alleged, —seventhly, to the indebitatus counts, never indebted as alleged,— eighthly, to the first of the indebitatus counts, a set-off for money payable by the said E. S. Prior and A. S. Prior before their bankruptcy to the defendants for rates, tolls, and other sums due from the said E. S. Prior and A. S. Prior to the defendants for tonnage and carriage of goods and coals conveyed for the said E. S. Prior and A. S. Prior on the defendants' railway, and for money found to be due from the said E. S. Prior and A. S. Prior before their bankruptcy to the defendants on accounts stated between them.

1. The plaintiffs are the assignees of Messrs. Edward Staff Prior and Alfred Staff Prior, who for several years previous to and up to the time of their bankruptcy carried on a large business in London and *elsewhere as coal-merchants, and had been in the habit of [*136 sending large quantities of coal over the railway of the defendants, who are the company incorporated and governed by the 4 & 5 W. 4, c. lxxxviii., and subsequent statutes.

2. In the month of December, 1857, the Messrs. Prior made a proposition to the defendants, which was accepted by them, as appears by the following letter from the traffic-manager of the defendants to the Messrs. Prior:—

"London, 31st December, 1857.

"Messrs. E. & A. Prior.

"Gentlemen,—I am instructed to inform you that the directors have agreed to your proposition to pay the monthly accounts rendered to you for the carriage of coal, &c., over this railway by bill at two months' date from the date of the last item in each account, and for the full amount of each account as rendered; any claim for overcharges, &c., to be made within one month from the date to which each account has been made up. "ARCHD. SCOTT."

3. This arrangement was acted upon by both parties until the month of August, 1859. The course of dealing was as follows:— The Messrs. Prior had two months' credit allowed them on all these tonnage payments, that is to say, at the end of each month, or shortly after that time, the defendants delivered to the Messrs. Prior the tonnage of the month immediately preceding. On receiving this account, the Messrs. Prior handed to the defendants their promissory note at two months' date for the amount; and, if it happened that there were any counter claims for overcharge or errors, these were deducted, not from the account of the month in which the errors occurred, but from that of the next ensuing month.

4. All payments for tonnage up to and including *the ton- [*137 nage account for the month of April, 1859, the promissory note for which was drawn on the 4th of May, 1859, and became due on the 7th of July, 1859, were duly and regularly made by the Messrs. Prior.

5. On the 3d of June, 1859, the defendants sent in to the Messrs.

Prior their account for tonnage for the month of May, 1859. This account amounted to 494*l.* 7*s.* 7*d.*, for which sum the Messrs. Prior, on the same 3d day of June, drew their promissory note payable to the defendants, at two months after date, and sent it to them. This note fell due on the 6th of August, 1859.

6. On the 19th day of July, the Messrs. Prior received from the defendants their tonnage account for the month of June, 1859, amounting to 412*l.* 4*s.* 4*d.*, for which sum the Messrs. Prior drew their promissory note payable at two months after date, and sent it to the defendants on the 3d of August, 1859. This note was dated back to the 5th of July, 1859, and did not become due until after the bankruptcy of the Messrs. Prior, as hereinafter mentioned.

7. The Messrs. Prior stopped payment on the 6th of August, 1859; and on that day they wrote the following letter to Mr. Scott, the traffic-manager of the defendants:—

"London, 6th August, 1859.

"Archibald Scott, Esq.

"Dear Sir,—Owing to serious losses incurred in former years, and which we have to the present time been struggling against, we regret to find at the last moment that we are unable longer to contend against them and meet our engagements; and therefore we feel it our duty immediately to inform you, inasmuch as we feel that a trade which has cost us so much labor and expense to make, and is of value, is of too much importance to all the interests concerned to be *allowed to be broken up: and, having requested several of our large creditors to meet on Tuesday, at our solicitor's office, we would ask you, until their determination is come to, to charge the carriage of the coal to the consignee. You shall hear from us on Wednesday.

*138]

E. & A. PRIOR."

To this letter the defendants returned no answer.

8. The Messrs. Prior, who had stopped payment on the 6th of August, were adjudicated bankrupts on the 24th of August, 1859; and the act of bankruptcy on which the adjudication proceeded was a general assignment made and executed by them for the benefit of their creditors on the 10th of August, 1859.

9. The defendants were not aware of any act of bankruptcy committed by the Messrs. Prior until the date of the adjudication; nor did they have notice of any other act of bankruptcy committed by the Messrs. Prior but that upon which the adjudication proceeded.

10. The note drawn by the Messrs. Prior on the 3d of June, 1859, was presented for payment on the 6th of August, after the Messrs. Prior had stopped payment, and was dishonoured.

11. The Messrs. Prior did not purchase or sell any coals after their stoppage of payment on the 6th of August. But all coals which had been ordered and were then in transitu were sent forward to their customers.

12. On the 22d of July, 1859, and on several other days between that day and the 8th of August, 1859, the Messrs. Prior delivered to the defendants at their Nine Elms and Brentford stations quantities of coal to be carried and delivered by the defendants for the Messrs. Prior, as in the declaration mentioned. The value of such

coal so delivered to the defendants to be carried by them amounted to the sum of 299*l.* 2*s.* 1*d.*

13. No portion of such coals was ever delivered by *the defendants; but the whole thereof, being still in the possession of [*139 the defendants, were seized by them on the 8th of August, 1859, as alleged by them, under the powers of their act of parliament.

14. On the 23d of August, 1859, the defendants sent to the Messrs. Prior the following notice:—

"Traffic Manager's Office,
"Waterloo Station,
"23d of August, 1859.

"Messrs. E. & A. Prior.

"Take notice that you are hereby required to pay to me on behalf of the London and South Western Railway Company, at my office, as above, on the 24th of August instant, the sum of 494*l.* 7*s.* 7*d.*, being an account accrued due to the said company in respect of rates, tolls, and other sums by their acts authorized to be taken in respect of coals conveyed for you by the said company on their railway. And I do hereby, on behalf of the said company, demand payment of the said sum of 494*l.* 7*s.* 7*d.*

"ARCHIBALD SCOTT, Traffic Manager."

15. On the 1st of September, 1859, the following notice from the solicitors to the bankruptcy was served on the defendants:—

"To the London and South Western Railway Company, their officers, servants, and agents, and whomsoever else it may concern.

"As solicitors for and on behalf of the petitioning creditor and official assignee of the estate of Edward Staff Prior and Alfred Staff Prior, of, &c., coal merchants and copartners, bankrupts, we do hereby give you notice that the said assignee claims to be entitled to all wagons, utensils, stock, coals, barges, and other property whatsoever of which the said bankrupts were possessed at the time they became bankrupt, and *which were then or now are in your custody, [*140 possession, or control, at any place or places on your line of railway or elsewhere. And we do hereby require you to deliver up the same to the said assignee, on payment of such lien, if any, as you are by law entitled to claim thereon. And, in case you claim to be entitled to any lien on the said property, or any part thereof, we do hereby require you to furnish us with the particulars of the lien you so claim, and on what property in particular you claim to have such lien. And take notice, that, in case you sell or dispose of the said property, or any part thereof, or refuse to deliver up the same on being paid such lien, if any, as you are lawfully entitled to claim thereon, the assignees of the said bankrupts' estate will hold you and every of you answerable in damages for such wrongful conversion.

"Dated this 31st day of August, 1859.

VANDERCOM, CREE, LAW & COMYN."

16. Subsequently to this notice, that is to say, on the 3d of September, 1859, the coals which had been seized by the defendants, as mentioned above, were sold by them. They fetched the sum of 228*l.* 15*s.*, after deducting expenses.

17. This action was brought to recover the sum of 299*l.* 2*s.* 1*d.*, being the value of the coals seized by the defendants on the 8th day

of August, 1859, and 1*s.*, being the damages claimed for the alleged non-appraisement of the coals.

18. It did not appear whether the coals were appraised prior to the sale or not. Neither the plaintiffs nor the defendants gave any evidence on the subject. But it was admitted by the plaintiffs that they had not sustained any injury whatever by the alleged non-appraisement.

19. The questions for the opinion of the court were,—first, whether
*141] the plaintiffs, as assignees as aforesaid, *were entitled to recover from the defendants the value or proceeds of the coals so seized by the defendants as above mentioned, or any part thereof, —secondly, whether the plaintiffs, as such assignees, were entitled to recover any damages against the defendants in respect of the alleged sale of the said coals without appraisement.

If the court should be of opinion that the plaintiffs were entitled to recover, judgment was to be entered for the plaintiffs, with costs, as the court might think right. If the court should be of opinion that the plaintiffs were not entitled to recover, judgment was to be entered for the defendants, with costs.

Montague Smith (with whom was *Maude*), for the plaintiffs.(*a*)—Two questions arise in this case,—first, whether the 166th section of the company's act, 4 & 5 W. 4, c. lxxxviii., has any application where there is a special contract for carriage,—secondly, assuming that it has, whether the formalities prescribed by the act have been complied with. The 166th section enacts "that the rates, tolls, and other sums by this act authorized to be taken shall be paid to such persons, at such places upon and near the said railway, and in such manner, and under such regulations as the said company or as the said directors shall, by notice to be annexed to the account or list of rates, tolls, or
*142] sums, direct and appoint; and, in case of refusal or neglect *on demand, to pay such rates, tolls, or sums as may have accrued due unto the respective persons appointed to receive the same as aforesaid, or any part thereof, the said company may, in case such rates, tolls, or sums shall amount to or exceed the sum of 10*l.*, sue for and recover the same by action of debt or upon the case in any of His Majesty's courts of record; or the person to whom such rates, tolls, or sums ought to have been paid may and is hereby empowered, whether such rates, tolls, or sums shall amount to the sum of 10*l.* or not, to seize the goods, articles, and things for or in respect whereof such rates, tolls, or sums ought to be or to have been paid, or any part thereof, and the carriage laden therewith, and also any other goods, articles, and things, and carriages, the property of or belonging to the same person or persons to whom the goods, articles, things, or carriages so made liable to seizure shall belong, and which shall pass on or along the said railway or any part thereof, and detain the same until payment of all such rates, tolls, or sums shall be made, together with the reasonable charges for such seizure and detention;

(*a*) The point marked for argument on the part of the plaintiffs was as follows:—

"That the railway company had no right to seize the goods in respect of which this action is brought, there being a special contract in existence between the Messrs. Prior and the company for the payment of the tolls by bill at two months' credit, and no demand having been made for the payment of the tolls until long after the seizure."

and, if such goods, articles, and things shall not be redeemed within five days next after the taking thereof, the same shall be appraised and sold, and such rates, tolls, and charges satisfied thereout, as the law directs in cases of distress for rent: Provided always, that, in case such rates, tolls, or sums so due as aforesaid shall not amount to the sum of 10*l.*, it shall not be lawful for the said company to sue for the same by action of debt or on the case, but the same shall and may be recovered by distress and sale, or otherwise, as is hereinbefore mentioned." [WILLES, J.—The question is whether the company became trespassers ab initio, for want of appraisement,—there being no provision in the special act like that in the 11 G. 2, c. 19, s. 19.] *The special act contemplates that the company shall give [*143 notice of the person to whom and the place at which the tolls are to be paid. This they have not done. The whole structure of the 166th section shows that it has reference to tolls in the ordinary way, and not to the case of a special contract like this, by which the parties have chosen to take the case altogether out of the statute, and which was subsisting down to the time of the bankruptcy. The power given to the company is one which should have been exercised strictly. The seizure of the coals took place on the 8th of August, 1859; and the notice was not given until the 23d, which was after the act of bankruptcy upon which the Messrs. Prior were adjudicated bankrupts. The property in the coals, &c., had changed before the sale. The company were then disposing of the property of the assignees, for the purpose of satisfying a debt due for tolls in respect of other goods.

Milward (with whom was *Lush*, Q. C.), contrà.(*a*)—It is not true that the agreement for two months' credit was subsisting at the time of the bankruptcy of Messrs. Prior. Their letter of the 6th of August, set out in paragraph 7 of the case, shows this; for they there ask the company to charge the carriage of the coal to the consignee. [KEATING, J.—Did the company assent to that?] That does not appear. The goods seized were in transitu after that date, and the *company had a clear right to seize them. [KEATING, J.—How do [*144 you get over the difficulty arising from the want of a demand?] There is a double demand here. An account is sent in for the month's tolls. That is a demand, which is complied with by the parties giving a promissory note for the amount at two months. [ERLE, C. J.—The company's servant asks for a promissory note: he does not demand toll.] The two months having expired, there is a second demand of the tolls: see par. 10. [ERLE, C. J.—All that is stated, is, that the note drawn on the 3d of June was presented for payment on the 6th of August, and was dishonoured.] It is submitted that that is a sufficient demand under the statute. It clearly was contemplated that credit might be given for the tolls, otherwise provision would not have been made for seizure for arrears: and, whether credit is given for one day or for two months, is quite immaterial. In the ordinary case of landlord and tenant, the fact of the landlord taking a bill or bond for

(*a*) The points marked for argument on the part of the defendants were as follows:—

"That the seizure and sale of the coals was justified for the tolls due to the company, and was authorized by the 166th section of the company's act, 4 & 5 W. 4, c. lxxxviii.: that, in default of evidence to the contrary, an appraisement would be presumed: but, if not, that the plaintiffs cannot recover for want of such appraisement, unless they have suffered damage therefrom."

arrears of rent, does not deprive him of his right to distrain. [WILLES, J.—That is clear; because rent is of a higher nature.] It goes beyond that: it is a bill given "for and on account" only: it amounts to payment only if the bill is honoured. [WILLES, J.—Primâ facie, that is clear also.] The promissory note having been presented on the 6th of August, 1859, and not paid, the company were remitted to their original position, with liberty to demand the agreed sum fixed between the parties. There is no suggestion that the tolls were not charged according to the tariff, or that the money was not payable to the traffic-manager. At all events, there was a perfect demand on the 23d of August, which was the day before the bankruptcy.

Smith, Q. C., in reply, was stopped by the Court.

*145] *ERLE, C. J.—Mr. Milward has failed to satisfy me that this distress can be sustained. The power of distress is a summary power which is to be exercised subject to the conditions which are annexed to it by law, whether the party claiming to exercise it be a landlord or a railway company. In the present case, the power of distress is given by the 166th section of the original act of incorporation of the defendants' company; and it is definitely given to a particular person and on certain definite conditions. The tolls are to be paid to such persons and at such places upon or near the railway as the directors shall by notice appoint. If the tolls are unpaid, a certain person is empowered to distrain for them. The person so empowered is the person to whom the tolls are appointed to be paid, by notification on the list of tolls. That person must demand the tolls due, and, that condition having been complied with, and the sum due remaining unpaid, the person to whom it ought to have been paid may distrain the goods; and if such goods are not redeemed within five days they may be appraised and sold, and the tolls and charges satisfied thereout as in the case of distress for rent. Now, there were several defects in the course of proceeding adopted by the company here. The distress was not made by the person named in the list of tolls or rates as the person to whom they were to be paid. Moreover, there was no previous demand of the tolls made by him. If so important a step is about to be taken as the seizure and sale of a man's property, it is obviously just that the party against whom such a power is going to be exercised should have notice of it. Here, no demand whatever was made by any one. The company agreed to take a promissory note at two months' date for each monthly account of tolls. Was there any demand of the sum due? The note was presented at maturity

*146] *and dishonoured. I think that was something essentially different from the demand contemplated by the statute which was to warrant a distress. I also think the defendants' justification fails because there was no appraisement, and therefore they became trespassers ab initio,—though I should have been sorry to have given judgment against the company on that ground, if the earlier conditions mentioned in the statute had been complied with.

WILLES, J.—I am entirely of the same opinion on both points. It is clear that the defendants under this act of parliament stand in precisely the same situation as an ordinary landlord does under the 2 W. & M. c. 5 and 11 G. 2, c. 19, s. 19, and became trespassers ab initio.

KEATING, J., concurred.

Smith, Q. C.—The court are to say for what amount the judgment is to be entered,—whether for the value of the articles seized, or the amount of the proceeds. The sale being wrongful, the assignees submit that they ought to recover the value, which is found by the case to have been 299*l.* 2*s.* 1*d.*, whereas the proceeds, after deducting the expenses, were 228*l.* 15*s.* only.

WILLES, J.—Is the case going further?

Lush, Q. C., answered in the negative.

ERLE, C. J.—Then let the judgment be entered for 228*l.* 15*s.*

Judgment for the plaintiffs accordingly.

*BLASCO *v.* FLETCHER and Another. [*147

A ship bound for Havana, laden with a general cargo under a charter-party at a lump-freight, left Liverpool on the 1st of August. On the 7th she ran upon the Blackwater bank on the Irish coast, and sustained serious damage, and was ultimately got into Arklow, where part of the cargo was landed, the rest having been transhipped and taken to Liverpool. Rice, which represented a third of the freight, was found to be so damaged as to be admittedly incapable of being taken on. All the rest of the cargo (except an inconsiderable portion) was damaged to such an extent that in the opinion of competent witnesses it could not have been carried to its destination in a merchantable condition, and in fact would have been almost worthless. Whilst the vessel with the goods were at Arklow, S., one of the charterers, went over to represent the interests of the shippers; and the master gave him a written authority to "act on behalf of the owners (of the ship) to the best of his judgment and ability." S., conceiving from the condition of the goods that they could not profitably be carried to Havana, or at all without much delay and expense, ordered the goods to be sold. The sale took place on the 12th of September.

In the meantime the captain proceeded to Dublin to repair the vessel: the repairs (which cost 2300*l.*) were commenced in September, and were finished by the following February, when the ship proceeded to Cardiff, and there obtained a charter less remunerative than that in question.

In an action by the master claiming damages for wrongfully preventing him from carrying the goods on to the Havana and earning freight, the learned judge told the jury, in substance, that the defendants were justified in what they did, provided it was the reasonable course to take, having regard to the interests of all parties.

The jury having found for the plaintiff,—Held, that the question was properly left to them, and their finding warranted by the evidence.

THIS was an action for freight alleged to be due on a charter-party.

The first count of the declaration stated, that, on the 3d of June, 1861, a charter-party was made by and between the plaintiff and the defendants, and which said charter-party was and is in a foreign, to wit. the Spanish language, and was and is to the tenor following, that is to say [setting out the instrument in Spanish]; and such being translated into the English language, was and is as follows, that is to say, "Liverpool, 3d June, 1861. It is mutually agreed between Jacobo Blasco, captain of the good ship Primera de Torrevieja, of about 332 tons, classed 5/6 A. 2. 1. for three years in Bureau Veritas, zinced, being tight, staunch, and strong of keel and sides, and every way fitted for the voyage, and with all the necessary papers to combine the privileges of the Spanish flag, now in Liverpool, and Messrs. G. H. Fletcher & Co., merchants, that, 1st: the captain cedes the whole of the ship from stem to stern for the exclusive benefit of the charterers; cargo to be brought to and taken from *alongside the [*148
vessel at charterers' expense, and received at the port of dis-

charge according to the custom of the place; the cargo to consist of licit goods, including powder in the river: 2d. The stowing of the ship and the needful for this to be done by captain in a seamanly style, but by no means to exceed what she can reasonably stow and carry under deck: the captain binds himself to employ charterers' stevedore, paying 10*d.* per ton, but, as he is to work under the inspection of the captain, charterers are not answerable for the stowage: 3d. The captain to sign bills of lading as soon as the cargo or portion is delivered alongside in the usual and customary manner, and for any freight that may be inserted in them by charterers; and it may be the duty of the mate to sign a receipt for all cargo as it is delivered alongside the ship: 4th. The port-charges, stowage, customs, and consular despatches, dock-charges, and quarantine, and any others that may be incurred in the ports of refuge, loading and discharge, to be for account of the ship: 5th. The averages that might happen, no matter what, to be arranged according to the custom of the reigning laws; the captain nor his agents at no time are to make any claims against the charterers for damages, accidents, or misfortunes that might happen to the ship on her voyage: 6th. Thirty running days (Sundays excepted) to be allowed the charterers for loading the ship, to commence on the day the 'leal' clears, being ready to receive her cargo; the captain to advise this by writing to the charterers, and to expire the moment the despatches are delivered to the captain, or advice that they are at his disposal; 3*l.* per day over and above the said days to be paid captain if the ship be not sooner despatched: 7th. The captain allows a brokerage or commission of 5 per cent. on the freight and demurrages as soon as this charter is signed: 8th. As
*149] soon as the ship is loaded and *despatched in the Custom-House, she will immediately sail, and, if weather permits, proceed to Havana without touching at any port except in case of need, and on arrival to be consigned to the agents of charterers who they will appoint, paying the usual commission in and out; the captain binds himself to take 500 tons dead weight, or freight to be reduced in proportion: 9th. On the right and true delivery of the cargo, the charterers will pay the captain, or his order, the agreed sum of 1000*l.* and no more, in discharge of all rents and freight, in the following manner,—the captain will receive the bills of lading payable in the port of discharge, and the balance to be settled here in the usual manner, deducting the premium of insurance on the amount: 10th. The captain binds himself to sail as soon as he receives his despatches, if weather permits and other vessels sail, or allow the charterers 10*l.* per day for that delay, and be answerable for any prejudice that may arise from that delay: 11th. If the ship be detained on account of bad weather after all the lay days have expired, he will receive cargo on board in the mean time without charging any demurrage: For the punctual and exact fulfilment of this charter, the parties concerned bind themselves in the forfeited amount equivalent to the amount of freight in case either should not fulfil the terms of this charter. In faith and testimony this present is signed in duplicate in Liverpool, fecha ut suprà. This agreement will only be valid if the existing contract for Santanan is annulled, the result of which is to be known to-day." Averment, that the said Messrs. G. H.

Fletcher & Co. in the said charter-party mentioned were and are the defendants, and the said ship was duly laden with a cargo to be conveyed therein upon the said voyage from Liverpool to Havana, and the defendants delivered to the plaintiff, and he received from them the *said bills of lading of the said cargo payable in the port of discharge according to the terms of the said charter-party; [*150 and the said ship, being laden with the said cargo, sailed and proceeded on the said voyage; and the said ship, while proceeding on the said voyage and laden with the said cargo, by and through the perils of the seas became and was greatly damaged, and it became and was necessary that the said damage to the said ship should be well and sufficiently repaired, in order that the said ship might further proceed upon and complete the said voyage, and that the plaintiff might convey and deliver the said cargo at the port of discharge as aforesaid: and the plaintiff always was ready and willing to procure the said ship to be well and sufficiently repaired within a reasonable time in that behalf, and to have the said ship further proceed upon and complete the said voyage, and to convey the said cargo in the said ship to and to deliver the same at the port of discharge as aforesaid,—of all which premises the defendants had notice; and all conditions precedent had been performed, and all things had happened, and all times had elapsed, necessary to entitle the plaintiff to maintain this action: yet the defendants did, before a reasonable time for the said repairing of the said ship had elapsed, wholly refuse, and from the time of their refusal to the commencement of this suit continued to refuse, to suffer and permit the plaintiff to convey the said cargo in the said ship upon the said voyage, and hindered and prevented the plaintiff from further proceeding upon and completing the said voyage, and from conveying the said cargo to and delivering the same at the port of discharge as aforesaid; and by reason of the premises the plaintiff has been prevented from obtaining payment of divers large sums of money payable for freight and otherwise under the said bills of lading *respectively, and of any part thereof, and [*151 thereby the said agreed sum of money, to wit, 1000*l.*, due and payable to and to be retained by the plaintiff under the said charter-party had become and was wholly lost to the plaintiff, and the plaintiff had been and was by means of the premises otherwise injured.

There were also the common counts for freight, for money received by the defendants for the plaintiff's use, and for money found due upon accounts stated; but the count for freight was abandoned at the trial.

The defendants pleaded,—first, to the first count, that they did not make and enter into such charter-party as alleged,—secondly, to the first count, that the said ship was not whilst proceeding on her said voyage damaged as in the declaration alleged,—thirdly, to the first count, that the plaintiff was not ready and willing to procure the said ship to be well and sufficiently repaired within a reasonable time in that behalf, as in the declaration alleged,—fourthly, to the first count, that the plaintiff was not ready and willing to have the ship further proceed upon and complete the said voyage, and convey the said cargo in the said ship, and to deliver the said cargo at the port of discharge as aforesaid, as alleged,—fifthly, to the first count, that

before the breaches complained of, it was mutually agreed between the plaintiff and the defendants that the said voyage should be wholly abandoned, and the said charter-party should be no further acted upon or proceeded with, and that the same should be rescinded and determined, and the same were then respectively abandoned, rescinded, and terminated accordingly,—sixthly, to the first count, that the defendants did not refuse and continue to refuse to suffer and permit the plaintiff to convey the said cargo, nor did they hinder the plaintiff from further proceeding upon and completing the said voyage, *152] and from conveying and delivering the *said cargo, as in the declaration alleged,—seventhly, to the first count, that the defendants did what the plaintiff complained of by his leave and with his consent,—eighthly, to the first count, that, by the said damage and injuries which happened and occurred to the said ship as in the first count mentioned, divers parts and portions of the said cargo then on board of her were wholly lost, and the residue thereof was so much and so greatly injured and damaged that it was not and could not nor could any part of it be put into a proper state and condition to proceed upon the said voyage; and that, if the said residue of the said cargo had been re-shipped, even after the best endeavours to put it into proper and fit order in that behalf, it never would or could have arrived at the said port of discharge in specie or otherwise than in a state of decomposition, and it would have been valueless and useless to all parties, and in such a condition that the consignees thereof at the said port of discharge would not have received and would not have been nor would anybody have been liable to receive the same, or to pay any freight for the said goods; wherefore the defendants, for the general benefit of all parties concerned, sold the said goods; and that the breach complained of was the said disposition by the defendants of the said goods.

To the indebitatus counts, the defendants pleaded, never indebted, payment before action, and set-off for work done and money paid, &c.

Issue was joined upon each of these pleas.

The cause was tried before Willes, J., at the last Summer Assizes at Liverpool. The circumstances under which the action was brought, and the evidence adduced in support of the defence, are fully set out in the judgment, post, p. 173.

The learned judge in his summing up told the jury, that, if a ves- *153] sel starts upon her voyage and is so *disabled by perils of the seas that she is obliged to put into a port, and is unable in her then state to proceed upon the voyage, the owner of the vessel is nevertheless entitled, if the voyage can reasonably be prosecuted, having regard to the interests of all parties concerned, to take out the goods, to repair the vessel, and to put the goods on board again and carry them to the port of destination, and so earn freight; that, if the owner does not choose to repair, the freighters get their goods and pay no freight; that, if the freighters do not choose to wait so long a time as will be required to put the ship in a condition to continue the voyage, and by agreement between the parties, express or implied, they take their goods, they pay freight pro ratâ: and he left the following questions to them,—first, Did the master elect not to go on with the voyage, or did he elect to go on with the voyage, and did

he give notice of such election to the shippers in a reasonable time?—secondly, Whether under the circumstances the voyage could in their judgment have been reasonably prosecuted; whether the damage sustained by the goods was so great and the delay necessary to set it right such that the voyage could not reasonably be continued? telling them that there must be a possibility of carrying a substantial part of the cargo to its destination, to make it the same adventure; and that of the reasonableness of time they must judge from all the surrounding circumstances.

The jury found that the goods were not in a reasonable state to send forward, and that the voyage could not reasonably have been prosecuted; but, as to whether or not there was an election by the master to abandon the voyage, they could not agree. The verdict was thereupon entered for the defendants.

Brett, Q. C., in Michaelmas Term last, obtained a *rule nisi for a new trial, on the ground that the learned judge misdirected [*154 the jury in telling them that the defendants had a right to prevent the goods being carried on, if it was unreasonable to carry them on, having regard to the interest of all parties concerned. [BYLES, J., referred to Strugnell *v.* Friedrichsen, since reported, 11 C. B. N. S. 452 (E. C. L. R. vol. 103).]

E. James, Q. C., and *Milward*, in Hilary Term last, showed cause.—The direction of the learned judge was perfectly correct. The rice, which constituted considerably more than a third of the freight, was confessedly so damaged that it could not be carried to its destination: and, of the remaining goods, the Manchester and Bradford goods, which represented a freight of 630*l.*, were in such a state that it would have been unreasonable in the highest degree to send them forward; and to put them in a state to enable them to arrive at Havana in a merchantable condition would have involved an amount of expense and delay which the freighters were not bound to incur. The iron, paint, and hardware (which represented only 120*l.* of the bill of lading freight) alone could have been sent forward: but that would have been substantially a totally different adventure. A considerable time elapsed before the captain elected to repair the ship; and, when he had elected, six months elapsed before the ship was ready to proceed on her voyage. Were the frieghters bound to wait all that time? Was it reasonable that the prosecution of the adventure should be so long delayed? Besides, the goods were landed and sold with the master's assent. His letter of the 9th of August, 1861, was a distinct authority to Sparke to do the best for all concerned. In Strugnell *v.* Friedrichsen, the master had allowed the shippers' agent to take out the wheat at their expense for the *purpose [*155 of forwarding it by another vessel. That case, therefore, has no application. In Vlierboom *v.* Chapman, 13 M. & W. 230, a cargo of rice, shipped at Batavia, was by the bill of lading to be delivered at Rotterdam to the plaintiff, he paying freight for the same. The vessel, having encountered a hurricane, was compelled to put into the Mauritius, when the rice, having been found to be damaged and in a state of rapid putrefaction, was of necessity sold by the master, who acted bonâ fide but without the knowledge of either the shipper

or shipowner: and it was held that no freight was due either for the whole voyage or pro ratâ itineris.

Brett, Q. C., and *Quain*, in support of the rule.—The proposition submitted by the learned judge to the jury was not laid down with such a degree of accuracy as to enable the jury to come to a just conclusion. That a large portion of the goods might have been carried on, is manifest from the result of the sale. The stipulations that are entered into between ship-owner and freighter are not conditions precedent: the only contract the former enters into, is, that he will not inexcusably delay the voyage: and the contract on the part of the freighter is that he will allow the ship-owner to carry the goods and earn the freight. If the ship-owner breaks his contract, he is liable to an action: but, even inexcusable delay on his part does not oust him of his action for the freight. If there be no bonâ fide intention on the part of the ship-owner to carry the goods on, that amounts to a rescission of the contract. Suppose goods are destined for a particular market, and the market is lost through unavoidable delay in the voyage, is there any pretence for saying that the owner of the goods can demand them without tendering freight? [*Milward* referred to Clipsham *v.* *Vertue, 5 Q. B. 265 (E. C. L. R. vol. 48.)] If the *156] vessel is disabled by a peril of the sea in the course of the voyage, what are the circumstances, if any, which will entitle the freighter to have back his goods without payment of any freight? Does the right of the ship-owner to carry on the goods depend upon their condition, there being no default on the part of the master? That question was left in doubt by our text-writers: but it is now clearly settled, that, if the goods exist in specie at the end of the voyage, the ship-owner is entitled to the entire freight. The real question here is, whether, in case of an insurance on freight, the owner under the circumstances proved here could have maintained a claim against the underwriters for a total or a constructive total loss of freight. The freighters thought it would be more profitable to them to sell the goods, and prefer a claim on the underwriters for the loss on the sale. The question left to the jury was, whether or not the adventure could reasonably have been prosecuted. They decided on the ground that the goods were not in a state to be profitably carried on. It is submitted that the rule laid down by the learned judge is so indefinite as to be wholly impracticable. It is introducing into these contracts a new ingredient, viz., the opinion of the jury as to the expediency of continuing the adventure. [WILLES, J.—Suppose this had occurred in a distant place, where no communication could be had with the freighters, and therefore the master would necessarily be left to exercise his discretion,—finding that the goods (substantially the whole of the goods), though they might have been carried on to Havana, would have arrived there in a totally unmerchantable condition, would the master have been justified in selling them on the spot?] Clearly not. In Machlachlan on Merchant Shipping, p. 322, it is said: "On general *157] principles, the law implies, in all contracts by *charter-party, where there is no express agreement as to time, a stipulation that there shall be no unreasonable or unusual delay in commencing the voyage (per Tindal, C. J., M'Andrew *v.* Adams, 1 N. C. 29, 38, 1 Scott 98; Mount *v.* Larkins, 8 Bingh. 108 (E. C. L. R. vol. 21), 1 M.

& Scott 165), or, if it has been commenced, no deviation in the performance of it (Davis *v.* Garrett, 6 Bingh. 716 (E. C. L. R. vol. 19), 4 M. & P. 540; Freeman *v.* Taylor, 8 Bingh. 124, 1 M. & Scott 182); but, although breach of this gives the freighter a right to damages, it is no defence to an action for non-performance of his own part of the contract (Dimech *v.* Corlett, 12 Moore, P. C. 199; Tarrabochia *v.* Hickie, 1 H. & N. 183), unless the plea also show that the purposes of the charter-party were altogether frustrated by the delay,"—citing Clipsham *v.* Vertue. At p. 364, speaking of the duty of the master in case of damage from a peril of the sea in the course of the voyage, it is said: "To repair the ship, therefore, if that be reasonable and practicable, is clearly his duty, in order to prosecute the remainder of the voyage (per Alderson, B., Benson *v.* Chapman, 2 House of Lords Cases 696; and he may retain the cargo till she is ready, unless, from the perishable nature thereof, that would be attended with serious injury (Laws of Oleron, art. 4; 1 Pardess. 325). In that case (per Lord Stowell, in The Gratitudine, Mazzola, 3 C. Rob. 240, 257), or in case the ship cannot be repaired at all, or not without unusual loss of time, he is at liberty to procure another ship and send on the cargo by it (Shipton *v.* Thornton, 9 Ad. & E. 314 (E. C. L. R. vol. 36), 1 P. & D. 216; Luke *v.* Lyde, 2 Burr. 883, 887, 889; Lutwidge *v.* Grey, cited ibid.) It has never been decided in this country whether under any circumstances he is *bound* to do this." [WILLES, J.—The learned author refers to Worms *v.* Storey, 11 Exch. 427, but he does not adopt the words of Lord Wensleydale. He cites (in the *note) a passage from the opinion of Alderson, B., in Benson *v.* Chapman, which applies to the duty as between master and ship-owner; and he passes over that part of Lord Wensleydale's judgment which relates to the duty as between the master and the owner of the goods.] He goes on: "By the Rhodian law (c. 42; 1 Pardess. 256), it is left discretionary; as it is by the laws of Oleron (art. 4; 1 Pardess. 325), and would appear to be so left by the Ordinance of Wisbuy, did not a subsequent article, copied also into the Hanse Ordinance (Ord. Wisbuy, art. 18; 1 Pardess. 472) bear evidence of a contrary disposition, thereby agreeing with the maritime law of Amsterdam (art. 17; 1 Pardess. 413). According to the interpretation put by Vinnius upon the Roman law, the master is thereby under no obligation to procure another ship when that by which he contracted to carry the goods is disabled (Vinnius in Peckium, 285, 295, "Quia de certa nave actum est"). But the Antwerp (art. 3; 2 Magens 14) and Rotterdam) art. 148: 2 Magens 105) Ordinances, as translated by Magens, employ the strongest terms of obligation. The French law, though phrased in the clearest language on this point, is so framed as to leave the intention thereof in doubt, and the most distinguished jurists of that country divided in opinion. 'Si le capitaine est contraint de faire radouber le navire pendant le voyage, l'affréteur est tenu d'attendre, ou de payer le fret en entier. Dans le cas où le navire ne pourrait être radoubé, le capitaine est tenu d'en louer un autre. Si le capitaine n'a pu louer un autre navire, le fret n'est dû qu'à proportion de ce que le voyage est avancé' (Code de Commerce, Art. 296, 391; Ord. 1681, liv. 3, tit. 3, art. 11; 4 Pardess. 362). Looking at the first and third members of this provision, and the consequent effect upon freight which is oper-

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*159] ated by each, it is not unnatural to conclude that *the second member is elliptically expressed, and should be construed as though followed by these words, 'ou de perdre le fret en entier.' Accordingly, it is the opinion of Valin (1 Valin 651) and Pothier (Poth. Charte-partie, no. 68), that he is no further bound to procure another vessel than by losing his freight if he omit to do so. Emerigon (Emerig. 422, 523, and per Boulay-Paty, 427), however, followed by Pardessus (3 Pardess. Droit Com. no. 715, and no. 644) and Boulay-Paty (Droit Maritime, Vol. 2, 400–405), maintains that, by the express language of the law, and the nature of the trust reposed in the master, it is his duty to hire another vessel, if it be possible, for the cargo; and that he is answerable in damages if he neglect it. Chancellor Kent, stating the law of America (3 Kent Com. 212), says,—'In this country, we have followed the doctrine of Emerigon and the spirit of the English cases, and hold it to be the duty of the master, from his character of agent of the owner of the cargo, which is cast upon him from the necessity of the case, to act in the port of necessity for the best interests of all concerned; and he has powers and discretion adequate to the trust, and requisite for the safe delivery of the cargo at the port of destination.'" At p. 417, treating of the apportionment of freight, the author says: "In the laws of Oleron, there is an explicit application of the principle to a case of sea damage, where the ship and cargo survive. 'If the merchants demand to have their goods of the master, they may well have them on payment of freight for so much as the ship has accomplished of the voyage, if the master chooses: but, if the master prefers, he may refit his ship, in case that can be done readily, and, if not, he may hire another ship, and the master shall have his freight according to the quantity of goods saved in any manner.'" At p.
*160] 418, he quotes the French law. "The French law, *following the article in the laws of Oleron respecting shipwreck (Art. 4), and Le Guidon with regard to ransom (Le Guidon, c. 6, art. 7; 1 Pardess. 399), provides that, 'if the ship and goods are ransomed, or if the goods are saved from shipwreck, the captain is paid freight on to the place of capture or of shipwreck (Code de Commerce. art. 303; Ord. of 1861, liv. 3, tit. 3, art. 21, 22; 4 Pardess. 363). Again. 'If the captain is compelled to repair the ship in the course of the voyage, the freighter is bound to wait or to pay the whole freight; in case the vessel cannot be repaired, the captain is bound to hire another; and, if another vessel cannot be hired, freight is due only in proportion to what of the voyage is performed' (Code de Commerce, art. 296; Ord. of 1681, liv. 3, tit. 3, art. 11; 4 Pardess. 362)." The law is similarly laid down in Lawes on Charter-party (ed. 1813), p. 154. Tronson v. Dent, 8 Moore's P. C. 419, is a very important case. There, a cargo of opium, shipped at Calcutta, was, by the bill of lading, to be delivered at Hong Kong to the respondents. The ship came in collision at sea with another vessel, and received so much injury as to compel her to put in at Singapore, where the cargo was found to be partially damaged by the salt water. The master, who acted bonâ fide and to the best of his judgment, selected the damaged chests of opium and sold them by auction, and forwarded the remainder to Hong Kong. It appeared that he might have had the damaged

opium re-dried and re-packed while the vessel was re-fitting, and have forwarded it, though deteriorated in value, with the other opium. It was held, that, under such circumstances, in an action brought by the consignees against the ship-owner for the value of the opium damaged and sold, it was the duty of the master to carry the cargo to its place of destination, as the goods could have been delivered in a merchantable, *although damaged state. Sir John Patteson, [*161
in delivering the judgment, says (p. 450): "The master's duty is, to carry the cargo and convey it to the place of its destination, if the goods can be carried to the place of their destination in a merchantable state, although very much damaged: it is a grave question whether the master can in any case be justified in selling the cargo because the goods would be more damaged in the course of conveying them from the place where he repairs his ship to the place of ultimate destination than they have been already at the time he comes there. They may be damaged 10 per cent. at the place where he is obliged to put in in order to repair his vessel, and it may be that they will be damaged 20 per cent. by the time they arrive at the place of their destination; but it does not follow that he is at liberty to sell them on that account. If they are in such a state that he cannot convey them in the shape of merchantable goods to the place of their destination, and if they would utterly perish when they arrived at their place of destination, that is quite another consideration." Here, there was nothing to prevent the goods from being sent on: they might have been dried and re-packed, and would unquestionably have arrived in specie at the Havana. He then goes on to cite several cases, and amongst others Robertson *v.* Clark, 1 Bingh. 445 (E. C. L. R. vol. 8), to show that to justify a sale the necessity must be urgent. In Rosetto *v.* Gurney, 11 C. B. 176 (E. C. L. R. vol. 73), it was held, that, where the whole or *any part* of a cargo (having suffered sea-damage) is practically capable of being carried on to its destination in a merchantable state, it is the duty of the master to carry it on. In the 5th American edition of Abbott on Shipping (by Story and Perkins), p. 446, it is said: "If by reason of the damage done to the ship, or through want of necessary materials, she cannot be *repaired at all, or not without very great loss of time, [*162
the master is at liberty to procure another ship to transport the cargo to the place of destination. But, if his own ship can be repaired, he is not bound to send the cargo by another, but may detain it till the repairs are made, and even hypothecate it for the expenses of them, that is, supposing it not to be of a perishable nature: if it be of such a nature, and there be not time or opportunity to consult the merchants, he ought either to tranship or sell it, according as the one or the other will be most beneficial to the merchant. The disposal, however, of the cargo by the master is a matter that requires the utmost caution on his part. He should always bear in mind that it is his duty to convey it to the place of destination. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by any reasonable and practicable method." Again, at p. 703, it is said: "A merchant who has laden goods cannot insist upon having them re-landed and delivered to him without paying the freight that might become due for the carriage of

them, and indemnifying the master against the consequences of any bill of lading signed by him." Tindall *v.* Taylor, 4 Ellis & B. 219 (E. C. L. R. vol. 82), expressly confirms that. In Hunter *v.* Prinsep, 10 East 378, 394, Lord Ellenborough says: "The principles which appear to govern the present action are these: the ship-owners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas or other unavoidable casualties; and the freighter undertakes, that, if the goods be delivered at the place of their destination, he will pay the stipulated freight: but it is only in that event, viz. of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be
*163] disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded, unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the ship-owner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the ship-owner has no right to withhold the possession from him, unless he has either earned his freight or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession." That, it is submitted, states the proposition quite correctly. The right of the master to sell is one thing; his obligation to do so is another. [WILLES, J.—The witness Campbell said that the great bulk of the goods,—the Manchester and Bradford goods; the rice being out of the question,—would have been utterly worthless if carried on.] The wreck occurred on the 7th of August, and the goods got into the hands of Sparke on the 9th. Some were sent to Arklow, and remained in his possession until the sale in September, no care at all being taken of them in the meantime. The evidence of Campbell was to the effect, that, if carried on *in their then state*, they would have been worthless at the end of the voyage. But, if they had been unpacked and dried, they might have been carried on in specie. No trace is to be found in any case or text-book of an action being maintained against the master or owner for not selling under such circumstances. In Mordy *v.* Jones, 4 B. &
*164] C. 394 (E. C. L. R. vol. 10), 6 D. & R. *479 (E. C. L. R. vol. 16), in an action on a policy of insurance on freight, it appeared that the ship, in the course of her voyage, having been injured by a peril of the sea, was obliged to put into a port and land the whole of her cargo; that part of the cargo had been so wetted by sea-water that it could not be re-shipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, and have been attended with expense equal to the freight; that, under these circumstances, the master sold these goods, and, finding he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo; and that the master's proceedings were such as a prudent man uninsured would

have adopted: and it was held that the underwriters were not liable for the loss of the freight of these goods. [WILLES, J.—Mr. Phillips (Ph. on Ins. 3d edit. § 1142) disputes the propriety of that decision: see the observations on that in the judgment of this court in Philpot *v.* Swann, 11 C. B. N. S. 281, 282 (E. C. L. R. vol. 103).] The French Ordinance of 1681, liv. 3, tit. 3, art. 11 (p. 641 of the 4to edit. of Valin), is as follows: "Si le maître est contraint de faire radouber son vaisseau pendant le voyage, le chargeur sera tenu d'attendre, ou de payer le fret en entier, et en cas que le vaisseau ne puisse être racommodé, le maître sera obligé d'en louer incessamment un autre; et s'il n'en peut trouver, il sera seulement payé de son fret à proportion de ce que le voyage sera avancé." And see Rogron's Commentary on art. 296 of the Code de Commerce. A very important light is thrown upon the subject by some American decisions, which are well worthy of attentive consideration. In Griswold *v.* New York Insurance Company, 3 Johnson 321, it is laid down, that, where goods are carried to the place of destination, *though spoiled so as to be of no value*, the owner cannot abandon the goods for the [*165 *freight, but the master is entitled to his full freight for the transportation of the goods. That was an insurance on freight from New York to Barcelona. The vessel, in going out of the harbour, and while proceeding on the voyage insured, was stranded, in consequence of which the cargo, consisting of flour, was so much damaged, that, had it been carried to its place of destination, it would not have been worth the freight. Information of the accident was given to the insurers on the day it happened, and two days after the insured abandoned as for a total loss. The vessel was repaired, and in a capacity to prosecute the voyage in seventeen days, and at an expense of about 150 dollars. The cargo, which was insured by others, had also been abandoned, and was accepted by the underwriters, and sold at auction, at a loss of about 27 per cent. It was held that the insured on the policy on freight had no right to abandon, but ought to have offered to the owners of the cargo to carry it to its place of destination, so as to entitle themselves to the freight. "When," says Kent, C. J., "the plaintiffs abandoned, on the 5th of March, they had a cargo in charge worth more than double their freight. The ship was in a condition to be immediately and easily repaired, and in seventeen days she was repaired and ready for sea. If the plaintiffs, instead of abandoning to the defendants, had offered to proceed with the cargo, and the owners of it had refused, they would have made themselves liable for the full freight. If the owners had consented, the plaintiffs would have been bound to proceed, and run the risk (against which risk the defendants had assured by the policy) of losing the freight by the loss of the cargo in the course of the voyage, or of earning freight by its safe arrival and delivery at the port of destination. How does it appear that freight could not have been earned? *For the plaintiffs to abandon without assuming this risk, was [*166 unreasonable and inadmissible. It would, no doubt, have suited very well with their convenience to have received the full freight for the voyage, without ever leaving the port of New York, and to have employed the time which that voyage would have consumed in earning freight on some other. But they cannot be per-

mitted to enjoy this good fortune, unless they can show clearly that the freight insured was lost either by the act of the shipper or by the perils of the sea. Whether it would have been wise or foolish in the shipper to have sent on the flour in the condition it was in, was a question not to be put by the plaintiffs. It was none of their concern. The risk of the value of the cargo at the port of delivery lay with the owners of the cargo. All that the plaintiffs had to do by their contract, was, to provide the means to take on the cargo, by repairing their ship or procuring another. The consideration for the freight is, the character of the article shipped on board; and the state or condition of the article at the end of the voyage has nothing to do with the obligation of the contract. It requires a special agreement to limit the remedy of the carrier for his hire to the goods conveyed. It cannot be deduced from the nature of the undertaking." That is an extremely strong case. In Jordan *v.* Warren Insurance Company, 1 Story 342, it was held that the shipper has no right to demand the cargo at an intermediate port without paying full freight, *whether it be damaged or not.* Story, J., says: "The question is, not whether the freight insured has been lost, but whether it has been lost by any peril insured against, so as to make the underwriters liable therefor. The ship was duly refitted for the voyage, and capable of resuming it within a reasonable time: and, if the condition of *167] the cargo had been then such that it could have been *re-shipped for the voyage, the master had a right to require it to be re-shipped, and was bound to proceed with it on the voyage; or, if he did not, the freight, if lost, would be lost by his default, and not by any peril insured against. It has been suggested that the time of the detention of the ship to refit was longer than the actual voyage to Havre;(*a*) and therefore that the master might reasonably refuse to proceed on the voyage. But the underwriters take upon themselves no risk whatsoever as to the length or duration of the voyage insured. What they undertake, is, that, notwithstanding any of the perils insured against, the ship shall be capable of performing the voyage, so as to earn the freight insured, not that the voyage shall be performed in a longer or a shorter period." That shows that the shipowner was entitled to carry on the goods even in their damaged state, and earn his freight. [WILLIAMS, J.—Do you claim the lump sum here?] No; only a proportion. WILLES, J.—How much of the cargo must the master deliver at the port of destination to entitle him to demand the lump sum?] The whole. In Abbott 524 (American edit.), it is said: "Suppose a ship chartered at a specific sum for the voyage, without relation to the quantity of the goods (in which case the contract, as observed by Hardwicke, C., in Paul *v.* Birch, 2 Atk. 621, is more properly a contract for the use of the ship than for the conveyance of the merchandise), should lose part of her cargo by a peril of the sea, but convey the residue to the place of destination, in this case I do not find any authority for apportioning the freight. And it seems to have been the opinion of Malyne (Lex Mercat. p. 100) that nothing would be due; and the case of Bright *v.* Cowper, 1 Brownlow 21, may be considered as an authority in support of that opinion. But, probably, if the question should arise again, the

(*a*) Two months.

*determination of it would depend upon the particular words of the charter-party; for, without a very precise agreement for [*168 that purpose, it seems hard that the owners should lose the whole benefit of the voyage, where the object of it has been in part performed, and no blame is imputable to them." To this the American editors add in a note,—"In Post *v.* Robertson, 1 Johnson 24, the Court held, that, where the ship is chartered for a specific sum for the voyage, the general rule is, that, if a part of the cargo is lost by the perils of the sea, and part conveyed to the port of destination, there can be no apportionment of the freight under the charter-party. By this is intended that no recovery can be had *upon the charter-party;* for, the majority of the Court inclined to the opinion that there might in another form of action be a recovery of freight in proportion to the amount of the goods brought home." [WILLES, J.—That seems to me to be the good sense of the thing: but it has no particular bearing upon this case.] It has upon the proportion of the freight which the owner is entitled to. [ERLE, C. J.—Proportion to what?] To the value of the goods carried on, or capable of being carried on. [WILLES, J.—It was clear that the rice could not go forward. Is any contract implied by law, except that the parties will do what is reasonable under the circumstances? It being impossible to perform the original contract, each party must do what is reasonable. WILLIAMS, J.—The rice having been sold by mutual consent, a new contract is substituted for the contract in the charter-party: and, if the plaintiff is driven to a quantum meruit, does not that admit the set-off?] That doctrine might apply if the plaintiff was suing for freight on the rice: but here the declaration is for refusing to allow the plaintiff to carry the residue of the cargo to its destination. In Clark *v.* Massachusetts Fire and Marine Insurance Company, 2 *Pickering 104, freight was insured from Richmond to Nice. [*169 The ship sailed on the 2d of September, and in consequence of sea-damage put into Kennebank on the 9th to repair. It was found that two months would be required for making the repairs and unloading and reloading, and the owner of the tobacco on board demanded that it should be sent on in another vessel, as otherwise the object of the voyage, which was to get the tobacco to the French market at the fall concours, would be defeated. The freight from Kennebank would have been as high as that from Richmond, or higher, and the shipowner declined hiring another vessel, but offered to repair his own and proceed on the voyage. The shipper insisted on the tobacco being sent on immediately or delivered up to him, otherwise it would be abandoned and the shipowner looked to for damages. He stated also that the freight, if any were due, should be settled. The shipowner then delivered the tobacco, and the shipper sent it on in a vessel belonging to himself. The underwriters knew that the cargo consisted of tobacco. It was held that the shipowner might have made the repairs and detained the tobacco for the purpose of earning the freight, and that the underwriters were not liable. Putnam, J., in a very lucid judgment, there says, p. 108: "Neither party is at liberty to abandon the contract without the consent of the other or without legal cause which was not procured or occasioned by the fault of the party who relies upon it. The books are not very definite

as to the time allowable to the master to repair and go on with his voyage. Some of the foreign regulations seem not to be consonant with reason, experience, or convenience, when applied to the usage of our own country. Thus, for example according to the laws of the Hanse Towns, *three* days at most are allowed to the master to repair. *170] By the *laws of Oleron, art. 4, if the master can *readily* repair his vessel, he may do so, or, if he pleases, he may freight another ship to perform the voyage. By the laws of Wisbuy, art. 16, it is said that the master may fit out his ship, if he can do it in a *little* time. Molloy (Book 2, c. 4, § 5) remarks, that, in such case, the master may either mend his ship or freight another: he uses no words of restriction as to time. And a distinguished English judge (Lawrence), in a case of Cook *v.* Jennings, 7 T. R. 381, adopts the general doctrine without limitation: 'When a ship is driven on shore, it is the duty of the master either to repair his ship or to procure another.' So, in Beawes's Lex Mercat. 135, 'He may either mend his own ship or freight another.' In the Marine Ordinance of France, B. 3, tit. 3, *Of freight*, art. 11, the rule is expressed without limitation as to the time: 'If the master is obliged to cause his ship to be refitted during the voyage, the freighter shall be obliged to wait, or pay his whole freight.' Abbott, Part 3, c. 7, s. 10, says, 'if the master will, he may repair his ship, if he can do it *speedily*.' What is to be understood by reparing *readily*, or *speedily*, or in a *little* time, must depend upon the circumstancas of each case. Chief Justice Kent, speaking of a ship which was repaired in *seventeen days*, observed that she was in a condition to be *immediately* repaired: Griswold *v.* New York Insurance Company, 3 Johnson 327. The result would seem to be, that the master might, if he pleased, have repaired in a reasonable time; and that time may be illustrated by considering what a prudent master would have done, if there had not been any insurance, and if there had not been any objection on account of the market,—with which it is well known underwriters have no concern." In M'Gaw *v.* Ocean Insurance Company, 23 Pickering 405, a ship laden with *171] tobacco and cotton on freight, *and bound from New Orleans to Havre, was injured by perils of the seas, and a part of the cargo damaged, and she returned to New Orleans for repairs. There was reason to believe that she could be refitted for sea in *three or four months*. The cargo could not be sent on in another vessel at a lower rate of freight, and the master delivered it up to the shipper: and it was held that the insurers on the freight were responsible for the loss of the freight on the portion of the cargo which was wholly destroyed, but that they were not responsible in respect of the sound portion, because the master was not bound to give it up without receiving full freight on it, but might have retained it to be transported in his own vessel, nor in respect of a portion of the cotton which was sold by the master at New Orleans in consequence of its being wetted by sea-water, although cotton in that condition is liable to spontaneous combustion. The rule is thus laid down by Shaw, C. J.: "When the goods are shipped and the voyage is commenced, the right of the shipowner to full freight has attached; and, in case of accident and detention, either by putting back to the port of departure, or by stopping at an intermediate port more or less distant from the port

of destination, the shipper has no right, without the consent of the shipowner, to demand and obtain the goods without paying full freight, in case the shipowner or the master can either refit his own ship *within a reasonable time*, and proceeds to do so, or within a reasonable time will transmit the goods in another vessel." "In case the vessel puts back to the port of departure, freights remaining as high as when the shipment was made, or if the detention be at a place from which to the port of destination freights are as high as the freight stipulated to be paid, then no benefit has been conferred on the shipper, no equitable obligation arises *to pay a freight pro ratâ itineris; and, if the shipper consents to take back [*172 his goods and the shipowner to surrender them, no freight is earned. But, if the shipowner was not obliged by law so to surrender them, then the freight is lost, not necessarily by the perils insured against, but by mutually rescinding the contract by which it would have been earned." "It is now well settled by a series of cases, that, if a vessel is damaged by one of the perils insured against, and in consequence thereof is obliged to put back or seek a port of refuge, and unlade and repair, the master, if he can refit his ship and proceed in a reasonable time, may retain the cargo and carry it to its place of destination, and will then earn his full freight. If, therefore, he voluntarily relinquishes the right to do so, by giving up the cargo to the shippers, he loses the right of earning the freight on that particular voyage by such voluntary act, and not by one of the perils insured against, and therefore the underwriters on freight are not answerable: Clark *v.* Massachusetts Fire and Marine Insurance Company, 2 Pickering 104. And it makes no difference in this respect, that, by such detention and retardation of the voyage, the arrival of the cargo at the place of destination will be so late as to disappoint the purposes of the shippers, by the change of the season, loss of market, or otherwise. *Nor does it make any difference if the cargo is damaged and unfit to be shipped, if it remains in specie, and can be carried to the port of destination;* as the shipowner is not responsible for the damaged condition of the goods, whether such damage arise from a principle of internal decay or from perils of the sea. In such cases, it is held, that, as between the shipper and shipowner, the latter is entitled to his freight *although the goods have become utterly worthless*, and that he has his remedy for his freight, not only by *a lien upon the [*173 goods (which in the case supposed would avail him nothing), but also by an action against the shipper on his contract for the carriage: Griswold *v.* New York Insurance Company, 1 Johnson 205, 3 Johnson 321; Herbert *v.* Hallet, 3 Johnson's Cases 93; Whitney *v.* New York Firemen Insurance Company, 18 Johnson 208." The law is similarly laid down in 3 Kent's Commentaries 213. These authorities, it is submitted, clearly show that the established rule of law is that the owners of goods are only entitled to have them back, under circumstances like these, upon paying or tendering the full freight (or without, if the conduct of the master amount to an abandonment); and that, in the case of perishable goods, if their detention whilst the ship is under repair will cause them to arrive at their port of destination in such a condition that they cease to exist in specie, *perhaps* the freighters may have them back without paying freight.

There being nothing to take this case out of the general rule, the ruling of the learned judge was clearly erroneous.

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court: (a)—

This was an action brought by the master of the Spanish ship Primera de Torrevieja against the defendants as charterers upon a voyage from Liverpool to the Havana at the lump sum of 1000*l.* The charter was dated at Liverpool the 3d of June, 1861, and it provided that bills of lading for an amount of freight equal to the sum in the charter should be handed to the master. The defendants loaded no goods of their own, but procured a general cargo from others, the *174] *bill of lading freight of which amounted to about 1210*l.*, made up in round numbers as follows,—Manchester and Bradford goods, 630*l.*; beer, 13*l.*; iron, 22*l.*; paint and hardware, 85*l.*; rice, 461*l.* The bills of lading were handed to the master, and he gave security for payment of the balance of the freight to be received in the Havana.

The vessel left Liverpool on the 1st of August, 1861; and, in the course of the voyage down St. George's Channel, on the 7th of the same month, she struck upon the Blackwater bank, off the Irish coast, where she lay with her cargo under water for a considerable time. The crew made their way to the shore with some difficulty, assistance was obtained, and the vessel and cargo saved and taken into Arklow in a damaged state. When there, the plaintiff telegraphed for Sparke, one of the defendants. That gentleman arrived upon the 9th of August. He had authority to represent the owners of the cargo: and he appears to have acted at the plaintiff's request as agent of the ship, and to have incurred expenses upon her account, in paying the salvage, in having the vessel taken to Dublin with a view to her repair if it should be determined upon, and, that which is the most important matter with reference to this question, in engaging a vessel to take to Liverpool the portion of the cargo in respect of which the complaint arises. The rice, which represented more than a third of the freight, was so damaged as to be admittedly incapable of being taken on.

Before Sparke acted in the matter, he required a written authority from the plaintiff, which he received, as follows:—

"Arklow, 9 August, 1861.

"Gentlemen,—As you are here to represent the interests of the *175] shippers of the Primera de Torrevieja, I *hereby request that you will act on behalf of the owners to the best of your judgment and ability; and this has my concurrence.

"JACOBO BLASCO, Master."

The vessel was taken to Dublin, and there repaired. The repairs, to the extent of 2300*l.*, commenced in September, and were finished in the following February. She then proceeded to Cardiff, where she obtained a charter less remunerative than that in question.

In the mean time, the defendants, acting, as they allege, upon the authority of the letter of the 9th of August, at their expense engaged the vessel to take the part of the cargo in question to Liverpool, where it was examined, and the bulk of it was found to be much

(a) The judges present at the argument were, Erle, C. J., Williams, J., Willes, J., and Keating, J.

injured by the salt water, and in such a state that it would continue to get worse if kept.

The evidence upon the character and amount of injury, except as to the rice, was conflicting. The jury believed the witnesses for the defence. One of them,—the defendant Sparke,—stated that he determined upon an immediate sale, upon the recommendation of the surveyors; that "the woollen goods and the rest of the cargo were not in a condition to be sent on under any circumstances," and that "it would not have been for the interest of the ship to have prosecuted the voyage under the circumstances;" and that "it was a great gain not to do so;" that the packages were "nearly all falling to pieces," the cargo "in a very bad state,"—damaged, in his opinion, 75 per cent., and "a great part of it could not be set right; that "it would have been to sacrifice the goods entirely to send them out;" that "they were available in this country, but would have been sacrificed by going out."

Mr. Campbell, the broker to the Liverpool Underwriters' Association, stated that the goods were *"saturated with salt water, and rendered unmerchantable (which he explained to mean, in [*176 such a condition that they could not have been disposed of at the Havana as merchantable or sound goods), quite irrespective of any question of freight;" that the Manchester and Bradford goods, the freight upon which was 630*l.*, or more than half the entire freight, were perishing rapidly, and quite unfit for re-shipment to the Havana, and that "the great bulk of them, if sent on, would have been almost worthless;" that the goods had been deteriorated to the extent of 55 to 60 per cent., and that "a delay of a week in selling them would have made a material difference; and that, "unless they were re-calendered and re-printed, they would not have been available for any purpose in the Havana." In answer to the jury, he stated that probably the printed goods might have been sent back and re-printed, but that, "because of the rice having got into almost every package, there was an amount of mildew which rendered that unadvisable."

Mr. Alexander, surveyor to the Mersey Dock Board, confirmed this evidence. Mr. Fallows, a calenderer and packer, gave evidence to the same effect, and, with respect to the blankets, stated that a great many of them were in such a state as that, "if you took one by one end, the other would fall off." He added that "all the goods were not utterly worthless," but that, in his opinion, "they would have been so if kept for six months or less."

Upon finding the state of the goods, the defendants came to the conclusion that the best thing to do for all parties, was, that the goods should be at once sold; which they were on the 12th of September, when they realized a gross sum of 7687*l.* 18*s.* 2*d.*

After the goods had been taken by the defendants to Liverpool, and before the sale, a correspondence *took place between them and the owners of the vessel, which ripened before the sale [*177 into a claim for the entire freight to Havana, or that the goods should be detained in order to proceed in the vessel. In the result, the sale was allowed to take place, but, as we shall assume in favour of the plaintiff, without prejudice to his claim.

Thereupon the present action was brought, claiming in one count

damages for wrongfully preventing the plaintiff from carrying on the goods to the Havana and earning freight, and in another count freight for the carriage of the goods. This latter count, to which the defendants had pleaded a set-off of the moneys paid by them for salvage on account of the vessel, was abandoned at the trial before Willes, J., at Liverpool; and the plaintiff relied upon the first count, to which the set-off was inapplicable.

The learned judge told the jury, in effect, that the defendants were justified in what they did, provided what they did was the reasonable course to take, having regard to the interests of all parties: and the jury found for the defendants,—adding, that they believed their witnesses.

The jury were not agreed upon the question whether or not the goods were returned absolutely and unconditionally.

A rule was obtained to set aside this verdict, upon the ground of misdirection, in telling the jury, that, if it was unreasonable, having regard to the interests of all parties, that the goods should go on, the defendants were justified; which rule was argued in Hilary Term last, before Erle, C. J., myself, Willes, J., and Keating, J., when the court took time to consider.

On the part of the plaintiff it was insisted by Mr. Brett and Mr. Quain, in an argument of uncommon force and learning, that the *178] shipowners were entitled *to insist upon having the goods returned to them, if any substantial part thereof was capable of being carried on in specie to the Havana, and that it mattered not how injurious this might be to the shippers, or even indeed to the shipowners; and that, as the shipowners were not found to have intended to give up the voyage, the sale of the goods, however reasonable it might be, was a breach of contract, and must be answered for in damages.

This argument, as applied to a case where the act of the shipper in taking possession of the goods is wrongful and unauthorized, is sustained by a series of authorities cited in the argument, and is unanswerable, even to the extent of showing that the shipowner is entitled to the entire freight, less discount.

It is inapplicable to a case where the goods are taken back absolutely and unconditionally by consent on both sides, the further carriage of the goods being intentionally dispensed with; and ordinarily in such a case the shipowner becomes entitled to freight pro ratâ itineris.

Whether the argument is applicable to the intermediate case of the goods being returned, not absolutely, but with an authority to the charterer to act for the ship as well as for the cargo, and such authority having been acted upon, and expense thereby incurred, before any countermand, is the question which we have to consider.

That question divides itself into two branches,—first, as to the lawfulness of the act of the defendants, apart from the express opposition of the owners to the sale taking place.

As to this, we think it clear that a sale of the damaged goods was within the scope of the defendants' authority under the letter of the 9th of August, provided such sale was the reasonable course to take,

*having regard to the interests of all parties. Under the extraordinary circumstances, it became the duty of the plaintiff [*179 as master to act for the best, with a due regard to the safety of the cargo. A great responsibility rested upon him in respect of this duty, which it was his interest to be rid of. The state of the cargo also was sure to raise difficulties at the Havana; and the master was answerable for part of the freight, so that, at the best, the certain present risk and inconvenience of keeping the cargo could only be paid for in future uncertain and litigious profit. Considerable expense had been already incurred. It was necessary to incur more. The vessel had been necessarily lightened of a great part of her cargo, whilst she was in a state in which it was doubtful whether she could ever be repaired.

Under these circumstances, the plaintiff gave the authority to the defendants, without which they declined to act. The circumstances, therefore, under which the letter of the 9th of August was given establish beyond doubt the intention which it clearly expresses, that the defendants, in receiving the cargo, did not simply consent to take upon them the burthen and expenses of representing the vessel, which they were under no obligation to do, but either absolutely to put an end to the voyage, or at least with an authority to do the best, having regard to the interests of all parties. Indeed, the plaintiff, though he stated that he gave no authority to sell the goods, and that they went to Liverpool because Sparke said it was the best place to dry and prepare them, admitted that Sparke's offer was, to do his best for him as well as the cargo, upon which the letter of the 9th of August was given, and that the plaintiff "left it to Sparke to do the best he could."

The defendants thus had authority to sell as they *did, unless [*180 that authority was countermandable and countermanded by the owners of the vessel. In our opinion, however, it was an authority which could not under the circumstances be countermanded after the defendants had acted and incurred expense in acting upon it as they did, inter alia, by incurring the expense of taking the goods to Liverpool long before any objection was made.

Therefore, the plaintiff's argument has failed; and, having carefully considered the evidence, we think the verdict for the defendants is in accordance with the manifest justice of the case.

Rule discharged.

In the principal case the master was deemed to have relinquished his right to demand freight by giving the shippers authority to retake the goods. He, in effect, with their concurrence rescinded the contract.

Where the master sold the cargo, without consultation with the shippers, he released them, by this conduct, from their liability for the freight. And their acceptance in part of the proceeds derived from the sale was not construed as a ratification of his course. The action was by the shippers for the residue of the proceeds realized by the sale of the goods, and the defendants pleaded the freight as a set-off. Said Woodward, J.: "They undertook to carry the plaintiffs' corn from Philadelphia to Liverpool, aboard the ship Tigress. A few hours out of port, the vessel was stranded, without fault of the master or crew. The plaintiffs' corn was taken out, transferred to lighters and brought back to Philadelphia in a wet and damaged condition, and was surveyed and

condemned to be sold for account of all concerned. All this occurred without notice to the plaintiffs, and without assent or action of any sort on their part." "In Hurtin *v.* The Union Insurance Co., 1 W. C. C. R. 530, Judge Washington laid down the law in these few and simple words: 'If the cargo is not conveyed to its place of destination, no freight can be demanded. If voluntarily accepted at any other port by the owner or his supercargo, freight *pro rata itineris* is due.' The case of Amroyd *v.* The Union Insurance Co., 3 Binn. 444, is to the same effect. So is the case of Callender *v.* The Insurance Co. of North America, 5 Binn. 525, wherein Chief Justice Tilghman, after discussing Lord Mansfield's celebrated case of Luke *v.* Lyde, 2 Burrows 883, says, 'it seems to have been understood that *pro rata* freight is not due, unless the consent of the merchant, either by words or actions, has been expressly given, or may be fairly deduced, to accept his goods at an intermediate port, and such consent being given, the original contract is dissolved, and a new one arises.' In the case of Gray *v.* Waln, 2 S. & R. 229, the same doctrine was applied, and a *pro rata* freight allowed, because upon the whole evidence it was impossible to entertain a doubt that the cargo was voluntarily received by the supercargo at a port short of the ship's destination. These Pennsylvania cases contain a very full discussion, both at bar and on the bench, of all the learning on the subject:" Richardson *v.* Young, 2 Wr. (Pa. 1861) 169; Lord *v.* Neptune Insurance Co., 10 Gray (Mass. 1857) 109.

Where the cargo is destroyed in specie at the port of distress, or is in such a condition that it would have been destroyed in specie before its arrival, had the attempt been made to carry it to its destination, the underwriters, and not the shippers, are liable for the freight. Says Nelson, J.: "The question in this case is, whether, on the facts, the owner of the vessel is entitled to freight. This question was very fully examined by me in the case of Hugg *v.* The Augusta Insurance and Banking Co. (7 How. 595, 606, 607), it being indirectly involved in the first question presented on the division of opinion in the court below. The court then held, that the underwriters would be liable for freight, as a total loss, if it should be found by the jury that there was a destruction *in specie* of the cargo, so that it had lost its original character at the port of distress, or that, if it had been reshipped, a total destruction *in specie* would, from the damage received, have been inevitable, before it could have arrived at its port of destination. The latter principle decides the question before me upon the facts of this case. The shippers were not liable for the freight; but the underwriters were:" 4 Blatch. (1860) 443.

COOPER *v.* THE BOARD OF WORKS FOR THE WANDSWORTH DISTRICT. *April* 21.

The 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, empowers the district board to alter or demolish a house, where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation:—Held, that this does not empower them to demolish the building, without first giving the party guilty of the omission an opportunity of being heard; and that the 211th section, which gives an appeal to the Metropolitan board of works, does not prevent the builder or owner of the premises from suing them for so doing.

THIS was an action for pulling down a house of the plaintiff which was in the course of erection.

The defendants justified their act under the 76th section of the Metropolis Local Management Act, 1855, 18 & 19 Vict. c. 120, which enacts, that, "before beginning to lay or dig out the foundation of any new house or building within any such parish or district,(*a*) or to rebuild any house or building therein, and also before making any drain for the purpose of draining *directly or indirectly into any [*181 sewer under the jurisdiction of the vestry or board of or for any such parish or district, seven days notice in writing shall be given to the vestry or board by the person intending to build or re-build such house or building or to make such drain; and every such foundation shall be laid at such level as will permit the drainage of such house or building in compliance with this act, and as the vestry or board shall order; and every such drain shall be made in such direction, manner, and form, and of such materials and workmanship, and with such branches thereto and other connected works and apparatus and water supply as hereinbefore [s. 73] mentioned, and as the vestry or board shall order; and the making of every such drain shall be under the survey and control of the vestry or board; and the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received, within seven days after the receipt of such notice; and, in default of such notice, or if such house, building, or drain, or branches thereto, or other connected works and apparatus and water supply, be begun, erected, made, or provided in any respect contrary to any order of the vestry or board made and notified as aforesaid, or the provisions of this act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches thereto, and other connected works and apparatus, and water supply, to be re-laid, amended, or re-made, or, in the event of omission, added, as the case may require, and to recover the expenses thereof from the owner thereof in the manner hereinafter provided."

The cause was tried before Willes, J., at the sittings in Middlesex after last Michaelmas Term. It *appeared that the plaintiff, a [*182 builder, was employed to build a house within the Wandsworth district, and had already reached the second story, when the defendants, without giving him any notice, sent their surveyor and a number of workmen, at a late hour in the evening, and razed it to the ground.

There was conflicting evidence as to whether or not the plaintiff had

(*a*) Mentioned in Schedules A. and B. to the act.

given the notice required by the 76th section of the Metropolis Local Management Act, of his intention to build; he alleging that he had, and the officers of the board denying that any such notice had come to their hands: but it was admitted by the plaintiff that he had commenced digging out the foundations within five days of the day on which he alleged he had sent notice.

On the part of the plaintiff, it was submitted that the district board of works had no power under the circumstances to demolish his house; and that, assuming they had such power, they had improperly exercised it, by acting without notice to him or giving him an opportunity of being heard.

For the defendants it was insisted, that the 76th section of the statute gave them a discretion, against the exercise of which there was no appeal, except to the Metropolitan board of works under s. 211;(*a*)

*183] and *that, inasmuch as they were acting ministerially, and not judicially, they were not bound to give any notice.

Under the direction of the learned judge, a verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter the verdict for them, or a nonsuit, if the court should be of opinion that the action was not maintainable. A rule nisi having accordingly been obtained,

G. Denman, Q. C., and *Prentice*, showed cause.—The provisions of the 76th section of the Metropolis Local Management Act are so stringent and arbitrary that the court will be slow to hold that they override that sound and universally-applicable principle of natural justice, that no man shall be condemned either in person or property without having had an opportunity afforded him of being heard in his own defence. This was most emphatically held in The King *v.* The Chancellor, &c., of Cambridge (Dr. Bentley's Case), 1 Str. 557, 2 Ld. Raym. 1334, 8 Mod. 148, Fortescue 202, and has been repeatedly enforced since: see The King *v.* Benn, 6 T. R. 198; Harper *v.* Carr, 7 T. R. 270; Capel *v.* Child, 2 C. & J. 558; Hammond *v.* Bendyshe, 13 Q. B. 869 (E. C. L. R. vol. 66); Painter *v.* The Liverpool Oil Gas Light Company, 3 Ad. & E. 433 (E. C. L. R. vol. 30), 6 N. & M. 736. In

*184] Capel *v.* Child, Bayley, B., says that he knows of no case in *which you are to have a judicial proceeding by which a man is to be deprived of any part of his property without his having an opportunity of being heard. The like doctrine is laid down in the Hammersmith Rent-Charge Case, 4 Exch. 87. Under the Tithe Commu-

(*a*) "Any person who deems himself aggrieved by any order of any vestry or district board in relation to the level of any building, or any order or act of any vestry or district board in relation to the construction, repair, alteration, stopping, or filling up, or demolition of any building, sewer, drain, water-closet, privy, ashpit, or cesspool, may, within seven days after notice of any such order to the occupier of the premises affected thereby, or after such act, appeal to the Metropolitan board of works against the same; and all such appeals shall stand referred to the committee appointed by such board for hearing appeals, as herein provided; and such committee shall hear and determine all such appeals, and may order any costs of such appeals to be paid to or by the vestry or district board by or to the party appealing, and may, where they see fit, award any compensation in respect of any act done by any such vestry or district board in relation to the matters aforesaid: Provided that no such compensation shall be awarded in respect of any such act which may have been done under any of the provisions of this act on any default to comply with any such order as aforesaid, unless the appeal be lodged within seven days after notice of such order has been given to the occupier of the premises to which the same relates."

tation Act, 6 & 7 W. 4, c. 71, s. 82, when the half-yearly payment of rent-charge on land shall be in arrear and unpaid for the space of forty days, and there shall be no sufficient distress upon the premises liable to the payment thereof, it shall be lawful for any judge of His Majesty's courts of record at Wesminster, upon an affidavit of the facts, to order a writ to issue to the sheriff, requiring him to summon a jury to assess the arrears of the rent-charge remaining unpaid, and to return the inquisition thereupon taken to some one of the superior courts, &c.: and the Court of Exchequer,—Parke, B., dissentiente,—held, that such order could be made on an ex parte application to the judge. Parke, B., in the course of his judgment, says: "It has long been a received rule in the administration of justice, that no one is to be punished in any judicial proceeding, unless he has had an opportunity of being heard." In Austin *v.* The Vestry of St. Mary, Lambeth, 27 Law J., Ch. 388, and in The Popular District Board of Works, app., Knight, resp., 28 Law J., M. C. 37, notice was given by the board before any step taken by them under s. 76. In Tinkler *v.* The Wandsworth District Board, 27 Law J., Ch. 342, where the question arose upon the 81st and 85th sections of this statute,—the board having come to an arbitrary resolution that no privies or cesspools should be allowed in their district,—Lord Justice Knight Bruce says: "The question is not whether the board have power to cause or order privies within their district to be put in a proper and decent state, if not in that state: but it is, whether they have the right or power to force on *the plaintiff the mechanical contrivance of water-closets, with their requisite apparatus, for which he is to find water [*185 supply as best he may, instead of the privies (sufficient as privies, if kept in a condition proper for such conveniences, are) which are upon his land for the purposes of his cottages there. The claim of the defendants in that respect appears to me manifestly groundless. I should have thought so had they begun their operations by giving the plaintiff an opportunity of being heard, and of producing testimony, or in any event of hearing him, and if they had regulated themselves by analogy to judicial proceedings, and had deemed it reasonable to hear both sides: but, as matters were conducted, there has, perhaps, been a double error,—although upon this point I do not mean to speak as having formed an opinion; nor do I mean to intimate my impression how the case might possibly have stood had there been, as there has not been, any order of a justice or justices of the peace relating to the work or the privies. The right, however, or power to appeal given by ss. 211 and 212, c. 120, upon which stress was laid in the argument, appears to me not at all to prejudice or affect the plaintiff." And Lord Justice Turner says: "Whatever may be the powers given by this act to the local authorities to order water-closets to be provided instead of privies in particular cases in which that alteration may be required (I am assuming that, without in the least meaning to decide that the act gives that power), I think, that, whatever may be the powers given, upon the true construction of the act, and viewing it in the light most favourable to these defendants, they were bound to exercise their jurisdiction in each particular case, and that it was not competent to them to lay down any such general rule as that upon which the defendants acted; and that, in acting

*186] upon that rule, they *have exceeded the powers given to them by the act." And further he says: "If a tribunal having a limited jurisdiction goes beyond that jurisdiction, it is unnecessary to resort to the appeal clause." It is submitted, therefore, that the defendants' justification wholly fails.

Bovill, Q. C., and *B. C. Robinson*, in support of the rule.—The statute in question is one of a series of recent acts giving large powers to local boards for the public benefit, the great safeguard against abuses in the administration of which is, that the members of which these boards are composed are elected by the rate-payers of the district. Many things are to be done, some requiring notice, others not: and in many cases the object to be attained would be utterly frustrated unless done promptly. Such are the matters referred to in sections 73, 82, 83, 108, and 112. [WILLES, J.—The old commissioners of sewers, acting under the commission created by the statute 23 H. 8, c. 5, s. 3, proceeded by presentment of a jury, which the party had an opportunity of traversing.] They were a court of record, and acted judicially.(a) Unless the local board have the power here exercised, there being no penalty provided for disobedience, the direction of the 76th section will never be complied with. What necessity can there be for giving the party notice, when he well knows that he is doing an illegal act, and that the board have power to prostrate his house? It is not like a case where a judicial discretion is to be exercised. An arbitrary power is conferred upon the board, which is necessarily to be exercised without any control. In Bonaker *v.* Evans, 16 Q. B. 162, 171 (E. C. L. R. vol. 71), Parke, B., says: "No *187] proposition can be more clearly established than *that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, *unless indeed the legislature has expressly or impliedly given an authority to act without that necessary preliminary.*" The defendants were guilty of no excess here: they did nothing beyond what was necessary for pulling down the house.

ERLE, C. J.—I am of opinion that this rule ought to be discharged. This was an action of trespass by the plaintiff against the Wandsworth district board, for pulling down and demolishing his house; and the ground of defence that has been put forward by the defendants has been under the 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. By the part of that section which applies to this case, it is enacted, that, before any person shall begin to build a new house, he shall give seven days' notice to the district board of his intention to build; and it provides at the end, that, in default of such notice it shall be lawful for the district board to demolish the house. The district board here say, that no notice was given by the plaintiff of his intention to build the house in question, wherefore they demolished it. The contention on the part of the plaintiff has been, that, although the words of the statute, taken in their literal sense, without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognised, that no man is to be deprived of his property

(a) See The Queen v. Warton, 2 Best and Smith 719 (E. C. L. R. vol. 110.)

without his having an opportunity of being heard. The evidence here shows that the plaintiff and the district board had not been quite on amicable terms. Be that as it may, the district board say that no notice was given, and that *consequently they had a right to proceed to demolish the house without delay, and without notice to the party whose house was to be pulled down, and without giving him an opportunity of showing any reason why the board should delay. I think that the power which is granted by the 76th section is subject to the qualification suggested. It is a power carrying with it enormous consequences. The house in question was built only to a certain extent. But the power claimed would apply to a complete house. It would apply to a house of any value, and completed to any extent; and it seems to me to be a power which may be exercised most perniciously, and that the limitation which we are going to put upon it is one which ought, according to the decided cases, to be put upon it, and one which is required by a due consideration for the public interest. I think the board ought to have given notice to the plaintiff, and to have allowed him to be heard. The default in sending notice to the board of the intention to build, is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually conformed to all the regulations which they would wish to impose, though by accident his notice may have miscarried; and, under those circumstances, if he explained how it stood, the proceeding to demolish, merely because they had ill-will against the party, is a power that the legislature never intended to confer. I cannot conceive any harm that could happen to the district board from hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purposes of the statute, by the restriction which we put upon them, *that they should hear the party before they inflict upon him such a heavy loss. I fully agree that the legislature intended to give the district board very large powers indeed: but the qualification I speak of is one which has been recognised to the full extent. It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding, and that a district board ordering a house to be pulled down cannot be said to be doing a judicial act. I do not quite agree with that; neither do I undertake to rest my judgment solely upon the ground that the district board is a court exercising judicial discretion upon the point: but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down. The case of the corporation of the University of Cambridge, who turned out Dr. Bentley, in the exercise of their assumed power of depriving a member of the University of his rights, and a number of other cases which are collected in the Hammersmith Rent-Charge Case, 4 Exch. 96, in the judgment of Parke, B., show that the principle has been very widely applied. The district board must do the thing legally;

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there must be a resolution; and, if there be a board, and a resolution of that board, I have not heard a word to show that it would not be salutary that they should hear the man who is to suffer from their judgment before they proceed to make the order under which they attempt to justify their act. It is said that an appeal from the district board to the metropolitan board (under s. 211) would be the mode of redress. But, if the district board have the power to do what is here stated, I am not at all clear that there would be a right of redress in
*190] that way. The metropolitan *board may not have a right to give redress for that which was done under the provisions of the statute. I think the appeal clause would evidently indicate that many exercises of the power of a district board would be in the nature of judicial proceedings; because, certainly when they are appealed from, the appellant and the respondent are to be heard as parties, and the matter is to be decided at least according to judicial forms. I take that to be a principle of very wide application, and applicable to the present case; and I think this board was not justified under the statute, because they have not qualified themselves for the exercise of their power by hearing the party to be affected by their decision.

WILLES, J.—I am of the same opinion. I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that that rule is of universal application, and founded upon the plainest principles of justice. Now, is the board in the present case such a tribunal? I apprehend it clearly is, whether we consider it with reference to the discretion which is vested in it, or whether we look at the analogy which exists between it and other recognised tribunals (and no one ever doubted that such tribunals are bound by the rules which a court of justice is bound by), or whether you look at it with reference to the estimation in which it is held by the legislature, as appears from the language used in the statute.

First, with regard to the powers the board exercises with respect to sewers, and so on with respect to nuisances, and the power to remove certain excrescences in the public streets, or of insisting upon houses being provided with certain conveniences, and that they
*191] *shall be built at a certain level, and so on; all these are powers which are to be exercised with a due discretion. With respect to nuisances, the board exercises the power of a criminal court of high jurisdiction, because it has a discretion as to whether it will abate that which is a nuisance altogether, or whether it will simply direct that there shall be a modification of the works which in its opinion are necessary for the health of the neighbourhood. I apprehend it is clear that the powers thus exercised by the board under the act are powers which have always been considered judicial, and which could not be exercised without giving notice to the party who is to be proceeded against. In this very section, 76, the legislature speaks of coming "under the jurisdiction of the vestry or board;" and it is clear that these boards do exercise judicial powers. The power here is one that, probably more than any, requires that the party to be affected by it should be heard, because of its extent, and

because the board may be satisfied with a modification of that which has been done. The form of the section is peculiar. Notice is to be given; and, if the notice is given, then it is to be considered by the district board; and, if they think proper to make an order with reference to the manner in which the house is to be built, "the vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified to the person from whom such notice was received, within seven days after the receipt of such notice; and, in default of such notice," certain things may be done. The object of the notice is simply that the board may have an opportunity of directing how the work is to proceed; and, at the end of seven days, if there is no desire of the board emanating from them, the person may proceed according to the act of parliament. The section proceeds,—*"And in default of such notice, or if such [*192 house, building, or drain, or branches thereto, or other connected works and apparatus and water supply be begun, erected, made, or provided in any respect contrary to any order of the vestry or board, made and notified as aforesaid, or the provisions of this act, it shall be lawful for the vestry or board to cause such house or building to be demolished or altered, and to cause such drain or branches," &c., &c. The matter to be considered by the board before they make that order is, first of all, has any notice been given? And then the party clearly ought to be allowed to show, either that he has given a notice which may have been overlooked, or, if the notice has not been received by the board, to show that he did his best towards doing so, in order to induce them to look on the case favourably,—not to demolish the house, but to see whether any and what qualification is necessary for the purpose of bringing it within what should be done if the notice had been regularly served. In either of those cases, I apprehend, it is clear that it would be the right of the party to be heard. But there is a third case; and that is where, by wilfully disregarding the order, or by the act of some third person, whom he did his best to control, the owner of the house may have subjected his house to demolition by the board, or to be dealt with severely by reason of its defects. That is a case in which judicial power is to be exercised, and in which clearly the party sought to be affected should be heard. Then, as to the appeal section, 211, what light does that throw upon the matter? There is an appeal from the district board, not to any judicial tribunal in the sense of any tribunal more judicial in its form than the local board of works, but to the metropolitan board of works, which is just as much and just as little judicial in its acts as the board whose conduct *we are now considering. What is to take place upon such [*193 appeal? "And all such appeals shall stand referred to the committee appointed by such board for hearing appeals, as herein provided; and such committee shall *hear and determine* all such appeals." Nothing can be more clear than that the legislature thought that the matters which might come before the board upon appeal, that is, the same matters which came before the local board of works in the first instance, were proper, not only to be determined, but also to be heard; and, if fit to be heard upon an appeal, à fortiori fit to be heard in the first instance, before a wrongful decision can make an appeal lie. With respect to the remark of Mr. Robinson,

that this is an appeal against an act, and that it may be that there may be an appeal against an *act*, and no appeal against an *order*,—the appeal against the act is introduced in favour of the party who is appealing, so as to give him a further time to appeal, if he should happen to miss the time for appeal after the order is made, if that order is acted upon to his prejudice. I apprehend, therefore, that that would not at all affect the construction of the section unfavourably to the plaintiff. There is another remark to be made with reference to these parties' proceedings. The board are not only to do the work of demolishing the house, if they think proper, or modifying it, but they are to charge the expenses on the person who has erred against the act. His property is affected and his purse is further affected. What happens upon that? and how is the money to be got? That is a proceeding under the 225th section, which is a section giving jurisdiction to the justices before whom the costs are to be ascertained and recovered; and it is clear that under that section the justices could not proceed without having before them the person against
*194] whom the expenses are to be *adjudged. And it does seem an absurdity to say, that, in determining the amount of expenses, the party shall be heard, but that, in determining whether proceedings should be taken, his mouth should be closed. I cannot help thinking that a board exercising this large power should follow the ordinary rule, that the party sought to be affected should be heard; and I think that the verdict for the plaintiff ought to stand.

BYLES, J.—I am of the same opinion. This is a case in which the Wandsworth district board have taken upon themselves to pull down a house, and to saddle the owner with the expenses of demolition, without notice of any sort. There are two sorts of notice which may possibly be required, and neither of them has been given: one, a notice of a hearing, that the party may be heard if he has anything to say against the demolition; the other is a notice of the order, that he may consider whether he can mitigate the wrath of the board, or in any way modify the execution of the order. Here they have given him neither opportunity. It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with Dr. Bentley's Case,(*a*) and ending with some very recent cases, establish, that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of
*195] the legislature. The judgment of Mr. Justice Fortescue, in *Dr. Bentley's case, is somewhat quaint, but it is very applicable, and has been the law from that time to the present. He says, "The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten

(*a*) The King *v.* The Chancellor, &c., of Cambridge, 1 Str. 557, 2 Ld. Raym. 1334, 8 Mod. 148, Fortescue 202.

of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was put to Eve also." If, therefore, the board acted judicially, although there are no words in the statute to that effect, it is plain they acted wrongly. But suppose they acted ministerially,—then it may be they were not bound to give the first sort of notice, viz. the notice of the hearing; but they were clearly bound, as it seems to me, by the words of the statute, to give notice of their order before they proceeded to execute it. Section 76 contains these words: "The vestry or district board shall make their order in relation to the matters aforesaid, and cause the same to be notified" (observe what follows) "to the person from whom such notice was received, within seven days after the receipt of the notice." The plain construction of those words, as it seems to me, is this: the order is to be notified, and, in the case of a person who has given a notice, that notification is to be conveyed to him within seven days from the date of his notice. That has not been done. There has been neither notice of the one sort nor of the other; and it seems to me, therefore, that, whether the board acted judicially or ministerially, they have acted against the whole current of authorities, and have omitted to do that which justice requires, and contravened the words of the statute. I *entirely agree with what my Brother Willes has said about section 211, which clearly shows, that, if the board acted ministerially, they ought to give a notice of the latter character. I cannot entertain any doubt that in this case the board have exercised their power wrongfully. [*196

KEATING, J.—I quite agree with the rest of the court. I think it is impossible to read the 76th section of the statute without seeing that the district board of works are to exercise a discretion of a very important character indeed; because they are authorized, where there has been no notice, or where their order has been contravened in any way, to demolish or to alter, as the case may require. Therefore, they are to form a judgment as to how far and to what extent demolition or alteration is required. That being so, surely it must be intended that they are, by means of hearing the party against whom their order is to be made, to ascertain the facts so as to be able to form a judgment upon the matter in question. If an illustration were required of the necessity for it, it seems to me this case would furnish it; because, just suppose that the district board of works here had issued a notice to the party to hear what he had to say, and that he had come before them and stated what was the fact, as established in this case, "I did not give you notice: I have contravened the statute: but, although I have done so, I can satisfy you that the house has been built and the drains have been made strictly in accordance with the requirements of the statute,"—can any one suppose for a moment that the board would have proceeded to inflict upon the man the grievous injury of demolishing his house? I cannot conceive it for a moment. I think the case itself furnishes the strongest illustration of the necessity of the *application of that rule to which the other members of the court have already referred. I quite agree, therefore, that the rule ought to be discharged. [*197

Rule discharged.(a)

(a) The question of damages was referred.

FREEMAN and Others *v.* SPRINGHAM. *May* 6.

A plaintiff is not *in any case* entitled to the costs of preparing for trial,—such as instructions for brief, drawing and copying briefs and documents, and advising on evidence,—until after notice of trial; and that even though the defendant has obtained repeated orders for time to plead extending down to five or six days before the commission day of the assize, and is under terms to take short notice of trial or such notice as the plaintiff can give.

THIS was an action brought to recover arrears of rent of a farm called Bolen's, at Great Warley, in the county of Essex, occupied by the defendant under an indenture of lease granted to him by the late Richard Palmer Roupell, of Lambeth, in the county of Surrey. The plaintiffs were mortgagees of the premises under William Roupell, an illegitimate son of Richard Palmer Roupell, who, at the time of the mortgage of that and certain other property adjoining to the plaintiffs, claimed to be entitled thereto under a deed of gift from his late father, dated the 9th of January, 1856; for the (confessed) forgery of which deed (amongst other things) William Roupell is now undergoing his sentence of penal servitude for life. The action was defended by Richard Roupell, the only legitimate son of Richard Palmer Roupell, who claimed as his heir-at-law.

The declaration in this action was delivered on the 6th of February last. The time for pleading expired on the 14th of February, but further time was granted. On the 18th of that month, an order was made for further time to plead on the terms of the defendant taking *short notice* of trial for the Essex Assizes, which were fixed to commence on the 9th of March,—the *last day for serving *full* notice of trial consequently being the 27th of February, and for *short* notice the 4th of March. On the 24th of February a further order for time was obtained; and on the 27th, a further order for two days' time, the defendant consented to take *any* notice of trial which the plaintiff could give, with liberty to change the venue to Surrey or London. The plaintiffs fully intended to try the case at the Essex Spring Assizes, and had every reason to believe that the action would be defended; nor had they or their attorneys any suspicion of any change of intention on the part of the defendant until Saturday, the 28th of February, when the defendant's attorney intimated that he should not plead. The plaintiffs' attorneys acted throughout in the bonâ fide belief and expectation that the cause would be tried at the approaching assizes, and they consequently proceeded to prepare their briefs. The last order for time to plead expiring on the 2d of March, and no plea having been delivered, the plaintiffs signed judgment on the 3d.

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On the taxation of the plaintiffs' costs on the 21st of March, the following items were objected to by the defendant's attorney, on the ground that they were not properly allowable before issue joined:—

"Instructions for brief; about 50 witnesses (several resident away from London), and voluminous papers	31	10	0
"Drawing brief, in part: fo. 290	14	10	0
"Three fair copies, with brief pleadings and documents in brief: fo. 344	17	4	0
"Three copies deed of gift, mortgage, leases, correspondence, &c., to accompany: fo. 336 each, less 30 folios of one copy not copied	17	6	0
"Drawing instructions to counsel to advise on evidence, and copy: fo. 8	0	10	8
"Fee to Mr. B. to peruse papers, and advise	7	12	0"

*More than three fourths of the expenses contained in these items had been incurred before the 28th of February, when the defendant's attorney for the first time intimated that he did not mean to plead. [*199

The master's attention having been drawn to a case of Cooper *v.* Boles, 5 Hurlst. &. N. 188, where it was held, that, when a plaintiff discontinues before giving notice of trial, the defendant is not under any circumstances entitled to any of the costs of préparing for trial, and therefore not to "instructions for brief," he disallowed the whole of the above items.

Garth, on a former day in this term, obtained a rule nisi to review the taxation. He submitted that the rule upon which the master acted applied only to the case of a plaintiff discontinuing, and not to the case of a judgment by default suffered by a defendant, after time obtained to plead, on the terms of taking any notice of trial which the plaintiff could give.

Lush, Q. C., and *J. Brown*, now showed cause.—It is a rule invariably acted upon by the masters of all the courts, not to allow any costs of preparing for trial before issue joined and notice of trial given. In Doe d. Postlethwaite *v.* Neale, 2 M. & W. 732, 6 Dowl. P. C. 166, it was held, that, where a plaintiff discontinues, not having given notice of trial, the defendant is not under any circumstances entitled to the costs of the drafts or copies of the briefs: and that rule was in Cooper *v.* Boles, 5 Hurlst. & N. 188, extended to "instructions for brief." Martin, B., in the last-mentioned case, says: "The present case falls within the authority of Doe d. Postlethwaite *v.* Neale, and Rivis *v.* Hatton, 8 Dowl. P. C. 164. The rule there laid down in a great majority of cases effects substantial justice. Here, no doubt, it caused some hardship: but we cannot *depart from a rule which has a salutary operation in the great majority of cases, because in a particular case it causes hardship. It was argued that there is a distinction between the costs of draft brief and copies, and instructions for brief. But instructions for brief are preparations for trial; and the rule applies to all costs of preparing for trial. No such costs are allowed if no notice of trial has been given. It was urged that the circumstance that the defendant was under terms of taking short notice of trial should be taken into consideration; but that was a difficulty cast upon him in consequence of his own conduct." There is nothing special in this case to take it out of the general rule. Issue joined and notice of trial given has always been considered as the dividing line. It is so laid in Dax's Practice 304. [*200

Garth, in support of his rule.—There can be no such unreasonable rule as that suggested. Where issue is joined and notice of trial given, the plaintiff has ten days at least to enable him to prepare for trial. But here the defendant will, if the argument succeeds, by gaining repeated indulgence, be putting the plaintiffs' attorney to the hardship of going on with his preparations at the risk of not getting them allowed if the defendant at the last moment declines to plead, or of neglecting his duty to his clients. The period embraced by a short notice clearly would be very inadequate for preparation for a trial of so momentous a character as the present: whereas, if the defendant had pleaded at the proper time, the plaintiffs would have

had twenty-six days for preparing. [BYLES, J.—The insisting upon short notice was the act of the plaintiffs themselves. You should have asked the judge to impose proper terms at the time.] That would be almost asking him to try the cause upon affidavits. This is
*201] plainly an *exceptional case. [ERLE, C. J.—We cannot make rules for exceptional cases.] There should certainly be some way of remedying so flagrant a case of injustice.

ERLE, C. J.—This is a rule for a review of the taxation, on the ground that the master has improperly disallowed the plaintiffs on a judgment signed for want of a plea their costs of preparing for trial, and generally all the costs of instructions for brief, and drawing and copying, no notice of trial having been given. I am of opinion that the master was quite right, and that the rule must be discharged. There has been a known rule of practice for a number of years, that neither party has a right to prepare for trial, so as to charge the expense of such preparation upon his opponent until issue has been joined and notice of trial given. That is the general rule; and it makes no difference that the defendant has obtained orders for time to plead, or even that he is under terms to take short notice of trial. I think the plaintiff, when time to plead is asked for, if he wishes to go on preparing for trial, should ask the judge to make his being allowed to do so a term on which the indulgence sought is granted to the defendant. No doubt, many of these costs which have been disallowed were very reasonably incurred as between attorney and client, from the very peculiar nature of the case. But I cannot help thinking the master did right in disallowing them as between party and party. I would accompany my judgment with a remark as to the very pernicious results of granting repeated orders for further time to plead: and I cannot help thinking it would tend much to the advancement of justice if the judges would agree that time to plead should never be granted without some special ground being laid for
*202] it. I do not, however, feel myself at liberty to make this case *an exception from the general rule: that might be made a ground for appealing to the court in very many cases. I think the rule should be discharged without costs.

WILLES, J.—I am of the same opinion. I have always understood the rule to be, that, if the plaintiff chooses to go on preparing for trial before issue joined and notice of trial given, he may do so, but he does it at the risk of the costs not being allowed if it should turn out that there is no issue. Where this is bonâ fide done, and necessary, the attorney will have a very good claim against his client, but not against his opponent. Experience shows that justice is best done in the great majority of cases by not allowing the costs of preparing for trial until after notice of trial has actually been given. If it were allowed, it would encourage parties to incur in many cases what might turn out to be unnecessary expenditure. That is clearly the rule in cases where full notice of trial is given. Does it, then, make any difference that the defendant has been put under terms to take short notice? I apprehend not. It would be hard if a defendant who is under terms to take short notice of trial should be deprived of the opportunity of avoiding expense by suffering judgment by default: and certainly the terms of the order are not so. It appears to me

that justice requires, that, where an order like this is asked for, the judge should be asked to impose a condition, to refuse the order unless the defendant will consent to take notice of trial on the spot. Such an order would impliedly warrant the plaintiff in proceeding at once with the necessary preparations for trying the cause. I think the general rule should be adhered to, unless some such special terms are applied for.

*BYLES, J.—I am of the same opinion. The rule is clear,— and it was so laid down a few days ago in this court in a case which arose under the Lands Clauses Consolidation Act, 1845,(a)— that the notice is the dividing line. Preparations made for trial before that time may be very properly undertaken, and the costs may be chargeable as between attorney and client, and also as between party and party if the cause should go to trial. But, as a general rule, nothing can be regularly incurred as between party and party before the full notice of trial at all events. Short notice of trial is very well understood: and I see no reason why there should be any difference in this respect between the two. Cooper *v.* Boles, 5 Hurlst. & N. 188, is a distinct authority to show, that, where a plaintiff discontinues before giving notice of trial, the defendant is not under any circumstances entitled to any of the costs of preparing for trial. That is a general rule which is equally applicable to the case of a defendant suffering judgment to be signed for want of a plea. Undoubtedly it is competent to the plaintiff in a case like this to ask the judge to place a limit on the indulgence granted to the defendant. As to taking such notice as the plaintiff can give, I prefer not to express any opinion upon it. [*203

KEATING, J.—I am of the same opinion. The importance of not multiplying exceptions to general rules cannot well be overrated. I must say I am glad to hear the opinions expressed by my Lord and my Brother Willes as to the inexpediency of too great laxity in orders for time to plead.

*WILLES, J.—Perhaps a convenient term to insert in the order would be,—"costs of preparing for trial to be costs in the cause for either party, if necessary." [*204

Rule discharged, without costs.

(a) In The Metropolitan Railway Company, app., Turnham, resp, post, p. 212.

GREEN and Another *v.* BAVERSTOCK. *May* 5.

Upon a sale of goods by auction, where the highest bidder is to be the purchaser, the secret employment of a puffer on behalf of the vendor is a fraudulent act, and vitiates the transaction.

THIS was an action against the defendant, a bidder at a public auction, for not clearing goods knocked down to him.

The declaration stated, in substance, that the plaintiffs put up and exposed to sale by public auction, in lots, divers goods, under and subject to certain conditions of sale, one of which was, that the highest bidder should be the purchaser, and another, that all lots should be cleared within a certain time; that the defendant became the pur-

chaser of certain lots; but that he refused to clear the same, and the plaintiffs were compelled to re-sell them at a loss.

The defendant pleaded that he was induced to purchase the goods by the fraud of the plaintiffs.

The cause was tried before the secondary of London. It appeared that the plaintiffs, who were auctioneers in the city of London, were employed by the owner of certain goods to sell them by auction, upon the usual terms,—amongst others, that the highest bidder should be the purchaser, and that the goods should be cleared within two days; that the defendant became the purchaser of goods to the amount of 7*l.* 16*s.* 3*d.*; that he refused to clear them, on the ground, that, since the sale, he had discovered that one Astell, a puffer employed by the *205] owner of the goods, had bid at the sale; *and that the goods were afterwards put up again, and on the second sale fetched only 1*l.* 12*s.* 8*d.* It was proved that Astell had bid for the lots which were knocked down to the defendant, and that no intimation had been given at the time of the sale that a puffer was present to bid on the part of the owner of the goods.

Upon these facts, it was contended on the part of the defendant, on the authority of Thornett *v.* Haines, 15 M. & W. 367, that the plea of fraud was made out.

The secondary, however, intimated an opinion that the employment of a puffer by the owner of the goods was no evidence to go to the jury of fraud on the part of the auctioneer; and under his direction a verdict was accordingly taken for the plaintiffs for 6*l.* 3*s.* 7*d.*

Kemp, on a former day in this term, obtained a rule nisi for a new trial, on the ground of misdirection.

Howard showed cause.—The question is, whether the mere fact of a person being present at the auction, and bidding on behalf of the owner of the goods, amounts to fraud. [ERLE, C. J.—I have always understood, that, if the vendor at an auction has a person there to bid on his behalf, whose presence for that purpose is not disclosed, that is evidence of fraud, of which the vendee on discovering it may avail himself. The learned secondary has directed the jury to the contrary thereof: that is a clear misdirection. In Thornett *v.* Haines, 15 M. & W. 367, it was held that the employment of a puffer renders the sale void, and entitles the purchaser to recover back his deposit from the auctioneer. Parke, B., there says: "As regards the present case, there is no difference in the law as laid down in the courts of law and *206] the courts of *equity. Lords Mansfield,(*a*) Kenyon,(*b*) and Tenterden,(*c*) have expressed their opinion, that, where the seller employs a party to protect the property which is to be sold to the highest bidder, although the Stamp Acts may authorize such a course, still the fact ought to be notified to the public. In equity, the employment by the vendor of one person to bid at a sale, in order to protect the property from being sold at an under value, is not fraud, although not notified; but in law it is otherwise." WILLES, J.—Probably the distinction between the rule in equity and at law is founded on the practice in equity, in cases of sales of property under the order of

(*a*) In Baxwell *v.* Christie, Cowp. 395.
(*b*) In Howard *v.* Castle, 6 T. R. 642.
(*c*) In Wheeler *v.* Collier, M. & M. 123.

the court, to have one bidder, the court being in those cases in the nature of a trustee. I have found no case where the distinction is taken, except where the sale has taken place under the order of the court.] In Thornett *v.* Haines, the sale was advertised to be "without reserve." That was not the case here. [ERLE, C. J.—The highest bidder,—that is, the highest bonâ fide bidder,—was to be the purchaser. I think the secret employment of a puffer is evidence of fraud; capable of course of being rebutted. If, for instance, the party, after being informed of the fact, elects to treat the sale as a valid sale, the fraud is condoned.] In Addison on Contracts, 5th edit. 67, it is said that "the vendor may if he thinks fit be his own auctioneer, and he may, unknown to the bidders, privately depute a third party to attend the sale and bid progressively for the property on his account, as a defensive precaution to prevent it from being sold at an under value; but he cannot lawfully employ more than one person for such a purpose:" and for this the learned author cites Flint *v.* Woodin, 16 Jurist 719. The practice is so universal that every one must be presumed to know that one puffer is always present: and there can be no good reason why a different rule should exist at law from that which prevails in the case of sales ordered by the Court of Chancery. [*207

T. Atkinson, contrà, referred to Crowder *v.* Austin, 3 Bingh. 368 (E. C. L. R. vol. 11), 11 J. B. Moore 283, where the vendor of a horse stationed his servant to join in the bidding at a public auction, and the servant bid up to 23*l.* after a bonâ fide bidder had bid 12*l.*, and this court held that the sale could not be enforced against a subsequent bidder. He was stopped by the court.

ERLE, C. J.—The secondary has here laid down a general proposition, that the secret employment of a puffer at a public auction is no evidence of fraud. That proposition is in my opinion untenable. It is evidence of fraud. I am not disposed to depart from the rule laid down by the Court of Exchequer in Thornett *v.* Haines. Where the sale professes to be on condition that the highest bidder is to be the purchaser, although it does not profess to be a sale "without reserve," the employment of a puffer is *some* evidence of fraud.

WILLES, J.—I am of the same opinion. At a sale by auction under the ordinary conditions, a person may reasonably expect, that, if he is the highest bonâ fide bidder, he will become the purchaser. If, unknown to him, a person is employed for the purpose of enhancing the price, that is a fraud: it is giving an artificial value to the thing which is offered for sale. The person so employed is employed for the purpose of falsely representing that he is willing to give for the article a price which he never intended to give. That *clearly is evidence of fraud. In Story's Equity Jurisprudence, § 293, treating of constructive fraud, it is said, that, "if under-bidders or puffers are employed at an auction to enhance the price, and deceive other bidders, and they are in fact misled, the sale will be held void, as against public policy." The learned author appears to make no distinction in this respect between common law and equity. When, however, one comes to inquire the reason for the conflict between law and equity upon the subject, it will be found to be as I suggested, viz., that, where a sale takes place under the order of the Court of Chan- [*208

cery, in order to prevent the estate from being sold below its real value, the presence of one puffer is allowed. At common law, however, the secret employment of a puffer is clearly evidence of fraud.

BYLES, J.—I also am of opinion that the jury were misinstructed as to the law in this case. What may be the practice of the Court of Chancery I do not profess to understand. But the rule at common law, I apprehend, is plain. Upon a sale by auction where the highest bidder is to be the purchaser, the secret employment of a puffer by the vendor is a fraudulent act. The sale is vitiated by the fraud, and void, unless the vendee, with knowledge of the fact, has acted upon it so as to deprive himself of the right to complain. This has been the law of England, and indeed of the whole of Europe, for a very long time indeed. It was a law of universal application even before the Christian era. "Tollendum est igitur ex rebus contrahendis omne mendacium. Non licitatorem venditor, nec qui contra asse liceatur, emptor apponet:" Cic. de Off. lib. iii., § 15.

KEATING, J., concurred. Rule absolute.

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*209] *STOATE v. REW. *April* 18.

A defendant in ejectment is not without showing special circumstances entitled to interrogate the plaintiff (under s. 51 of the Common Law Procedure Act, 1854,) as to the nature of the title upon which he relies: but he will be allowed to do so where he has been long in possession, and is altogether ignorant of the nature of the case he is called upon to meet.

BULLEN moved for a rule calling upon the plaintiff in an action of ejectment to show cause why the defendant should not be at liberty to deliver interrogatories pursuant to the 51st section of the Common Law Procedure Act, 1854. The proposed interrogatories were nearly identical with those which were allowed by the Court of Exchequer in Flitcroft *v.* Fletcher, 11 Exch. 543, viz., interrogating the plaintiff as to the character in which he sued, and the nature of the title on which he relied. That case, though frequently questioned, has never been actually overruled. [WILLES, J.—I can well understand that a man who has been in possession of an estate for a great number of years, and whose title is assailed by a stranger, should be permitted to interrogate his assailant in the way suggested. But it must be a matter of discretion in each case: and, my Brother Blackburn having exercised his discretion, and refused to allow the proposed interrogatories, you must show us some very strong reasons for overruling his decision.] This is clearly a case in which a bill of discovery would lie: Metcalfe *v.* Hervey, 1 Ves. sen. 248. Lord Hardwicke there says: "The question comes to this, whether any person in possession of an estate, as tenant or otherwise, may not bring a bill to discover the title of a person bringing an ejectment against him, to have it set out, and see whether that title be not in some other. I am of opinion he may, to enable him to make a defence in ejectment, even considering him as a wrongdoer against everybody." [ERLE, C. J.—You have no right to ask your opponent how he means to support his cause of action; but you may interrogate *him as to what will enable you to support your defence.] In Bellwood *v.* Wetherell, 1 Y. & C.

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(Eq. Exch.) 211, 216, Lord Abinger says: "The obvious line to be drawn is this, that, though in general the defendant has no right to a discovery of the plaintiff's title, yet in certain cases he will be entitled to a discovery of the nature, though not of the evidence, of that title. Thus, where a party files a bill as rector, the defendant may file a cross-bill to see whether the plaintiff in the original suit is entitled to have that which he admits may be due to somebody. The defendant may allege that some other person is entitled, and in such case he may file his bill of interpleader. If he does go that length, he may suggest that he has had notice that some other person is entitled paramount to the plaintiff, or that the plaintiff has parted with his right to the tithes; and, in such case, though there is no ground whatever to make the party disclose the evidence of his title, still there is ground to call on the party to discover the nature of his title, so that the defendant shall not be harassed a second time." [WILLES, J.—There are several other cases to the same effect. In a note to p. 165 of the 9th edit. of Chitty's Forms, it is said that Wightman, J., at Chambers, refused to act upon Flitcroft *v.* Fletcher, and held that the defendant could not interrogate the plaintiff as to his own pedigree or title, but only as to matters tending to establish the defendant's own title: Morgan *v.* Nicholl, Feb. 18, 1856; Cole on Ejectment, 204. And in Horton *v.* Butt, 2 Hurlst. & N. 249, the Court of Exchequer refused to allow the plaintiff in ejectment to call on the defendant in possession to answer interrogatories stating by what title he was so in possession. The Attorney-General *v.* The Corporation of London, 2 M'N. & G. 247, was a very strong case; but the circumstances were peculiar. It was there held that a *plaintiff is entitled to discovery from the defendant, [*211 not only of that which constitutes his, the plaintiff's, title, but also for the purpose of repelling what he anticipates will be the case set up by the defendant: but this does not extend to a discovery of the evidence upon which the anticipated case of the defendant is to be supported.]

ERLE, C. J.—As a general rule, it is not permitted to a party to interrogate his opponent as to how he means to prove his case, unless there be very special circumstances. If a man has long been in possession of an estate, and a stranger comes to dispossess him, the defendant may call for some general information as to the nature of the title which is to be made against him. But it must necessarily be very much a matter of discretion, depending upon the particular circumstances of each case.

WILLES, J.—No doubt the court has power to order particulars to be delivered in any case in which justice appears to require it. But that power is not to be put in motion without some special ground being laid for it. If it had been shown here that the defendant was wholly ignorant of the title intended to be set up against him, and was therefore utterly unprepared to shape his defence, the case might have been a proper one for the exercise of the jurisdiction. No special circumstances, however, are shown.

KEATING, J., concurred. Rule refused.

*212] *THE METROPOLITAN RAILWAY COMPANY, Appellants; ROBERT TURNHAM, Respondent. *April* 28.

Where a claim is made, under the 68th section of the Lands Clauses Consolidation Act, 1845, for compensation in respect of "*lands injuriously affected*" by the execution of the works of a railway company, and the claimant elects to have the amount of compensation settled by a jury, and gives notice to that effect, and the company issue their warrant to the sheriff to summon a jury,—although, it seems, they are not bound to give the claimant the ten days' notice (accompanied by an offer of compensation for *lands taken*) of their intention to cause a jury to be summoned, under s. 38,—yet, to disentitle the claimant to costs, under s. 51, on the ground that the verdict of the jury is given for the same or a less sum than the sum *previously offered* by the company, such offer must be made before (or, possibly at the time) the company give the claimant notice of the time and place of the inquiry, under s. 46.

***Semble*, that, where a matter is by an act of parliament referred to a Master of one of the superior courts, in the absence of an express provision to the contrary, it is so referred subject to the ordinary control of the court of which he is an officer.**

Therefore the decision of the master of the Court of Queen's Bench, either as to liability or the amount of the costs payable by the undertakers under the 52d section of the Lands Clauses Consolidation Act, 1845, is subject to review by that court; but binding and conclusive unless so appealed against.

THIS was a case stated under the 20 & 21 Vict. c. 43, for the opinion of the court upon a point of law which arose before Mr. Corrie, one of the police-magistrates of the Metropolis, upon the hearing of a complaint made to him under the provisions of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. The facts were as follows:—

1. By certain acts of parliament (which it is not material to refer to), the appellants (hereinafter called "the company") were incorporated, and were authorized to execute certain works in the county of Middlesex. The Lands Clauses Consolidation Act, 1845, was incorporated with the said acts of parliament.

2. In the execution of the said works and the exercise of their powers under the said acts, the company injuriously affected a house and premises of the respondent (hereinafter called "the claimant"), and the claimant became entitled to compensation in respect thereof.

3. The company not having made satisfaction to the claimant for this compensation, he caused to be served upon them, on or about the 2d of November, 1861, a notice in writing under the 68th section of
*213] the *Lands Clauses Consolidation Act, 1845, of which the following is a copy:—

"To the Metropolitan Railway Company.

"I, the undersigned, Robert Turnham, of the Euston Road, in the county of Middlesex, victualler, do hereby give you notice as follows, that is to say,—that I am the assignee of a lease of a certain piece of land on which is erected and stands a certain house and premises known as the Rising Sun, situate in Charlton Street, Euston Road, in the parish of St. Pancras, in the county of Middlesex, and under which lease I hold the said land, house, and premises for a term of twenty years and a half from the 29th of September now last past; that the said land, house, and premises are injuriously affected by the execution of the works of the Metropolitan Railway, in this, that, by reason of the said works, the soil of my said land has sunk and shifted, and is still sinking and shifting, and the foundations of the buildings thereon have been and are shaken and rendered unstable, and the walls of the said buildings have become cracked and are still crack-

ing, and the said soil and foundations are severally rendered unfit to bear certain proposed buildings thereon which they could and would have borne but for your said works, and I have been deprived of divers large rents and profits that I should have received and made from, by, and out of the said land, buildings, and premises, but for the said injuries, and I have been put to great expense in and about repairing and upholding the said land, buildings, and premises, and in and about making and causing to be made necessary surveys of the said injuries; that I claim the sum of 1000*l.* for compensation for the injury done to my interest in the said land, house, and premises by the execution of the said works; and that I desire to have the question of such compensation *settled by a special jury, and I hereby require you to do all things necessary to have the same so settled according to the statutes in such case made and provided. Dated," &c. [*214

4. In pursuance of this notice, the company, on or about the 20th of November, issued their warrant to the sheriff of the county of Middlesex to summon a jury for settling the amount of compensation to which the claimant was entitled. No previous notice of the intention of the company to issue their warrant was given to the claimant.

5. Shortly after the issuing of this warrant, it was arranged between the attorneys for the company and the claimant respectively, and with the consent of the undersheriff, that the jury should be summoned for, and the inquiry should take place on, the 6th of January, 1862.

6. Upon the 30th of December, 1861, the company caused to be served upon the claimant a notice in writing under the hand of their secretary, of which the following is a copy:—

"To Mr. Robert Turnham.

"Referring to your claim upon the Metropolitan Railway Company for compensation, in respect of which claim the company have issued their warrant for summoning a jury to determine the amount of such compensation, the company, though not admitting their liability to make any compensation, are willing and hereby offer to pay you the sum of 25*l.* as and for the compensation claimed by you, and hereby give you notice that this offer is, and is intended to be, a formal offer under the provisions of the Lands Clauses Consolidation Act, 1845. Dated," &c.

7. Upon the 6th of January, 1862, the said inquiry came on to be heard before the undersheriff of Middlesex and a special jury, when the jury assessed the *compensation to be paid to the claimant at the sum of 20*l.*; and thereupon the sheriff gave judgment for that amount, and the verdict and judgment were duly signed by him. [*215

8. Under these circumstances, the claimant contended that he was entitled, under the 51st section of the Lands Clauses Consolidation Act, 1845, to the costs incurred by him upon and incident to such inquiry; and, on the other hand, the company contended, that, under that section, they were entitled to one half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry and recording the verdict and judgment; all of which last-mentioned costs had been already paid by the company.

9. The claimant and the company by their respective attorneys applied to Mr. Hodgson, one of the masters of the Court of Queen's Bench, to settle the costs in accordance with their respective contentions. Master Hodgson, after considering the facts of the case as above stated, gave it as his opinion that the claimant was entitled to all his costs of and incident to the inquiry; and he taxed and settled the costs accordingly on that principle, and refused to tax and settle for the company the amount of those costs to one half of which they claimed to be entitled. The amount of the costs of the claimant incurred on and incident to such inquiry, and for which Master Hodgson gave his allocation, was 106*l.* 10*s.* 3*d.*

10. Payment of this amount was duly demanded by the claimant from the company; and, the same not having been paid within seven days after such demand, the claimant, upon the 7th of November, 1862, in order to recover the said costs under the 53d section of the Lands Clauses Consolidation Act, 1845, laid a complaint before the
*216] magistrate, upon which he *issued a summons calling upon the company to show cause why they should not pay the respondent the said sum of 106*l.* 10*s.* 3*d.*

11. This complaint came on to be heard before the magistrate on the 18th of November, 1862, when the claimant attended by his attorney, and the company by their counsel.

12. It then appeared to the magistrate, and he found it to be the fact, that, if it was sufficient that an offer should be made by the company a reasonable time before the holding of the inquiry, although after the issuing by the company of their warrant to the sheriff, then the offer made on the 30th of December, 1861, was a good and valid offer under the provisions of the Lands Clauses Consolidation Act, 1845, and that the sum of 25*l.* so tendered amounted to as much as the compensation given by the jury and the costs of the claimant up to the time of the tender.

13. The magistrate was however of opinion,—first, that the judgment of the master of the Queen's Bench was final under the 52d section of the Lands Clauses Consolidation Act, 1845; that he had power, not merely to tax the costs, but to settle which party was to pay them: Ross *v.* The York, Newcastle, and Berwick Railway Company, 18 Law J. Q. B. 199,—secondly, that, if it were his (the magistrate's) duty to decide the question, he was of opinion that a sum offered after the warrant had been lodged with the sheriff by the company, was not "previously offered" within s. 51 of the Lands Clauses Consolidation Act, 1845: see Yates *v.* The Mayor of Blackburn, 6 Hurlst. & N. 61, 29 Law J. Exch. 447.

The question for the opinion of the court was,—whether the costs of the inquiry as settled by Master Hodgson were, under the circumstances above stated, payable by the company to the claimant.

*217] *If they were so payable, then the warrant was to issue, unless the company should within ten days after the decision by the court pay to the claimant or his attorney the amount of the said costs. If such costs were not payable, the complaint was to be considered to have been dismissed, and no warrant was to issue.

H. Lloyd, for the appellants.—The 52d section of The Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, enacts that "the

costs of any such inquiry (before a jury) shall, in case of difference, be settled by one of the masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party, and such costs shall include all reasonable costs, charges, and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such inquiry." [ERLE, C. J.—I recollect a case in the Queen's Bench in which Lord Denman expressed an opinion that the certificate of the master was not final either as to liability or amount. I cannot, however, find any report of it. WILLES, J.—Does not the question turn upon the 38th section, which enacts, that, "before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the *works?"] That section does not apply to the case of lands taken or injuriously affected under s. 68. That section enacts, that, "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special act, or any act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation, and the amount of the compensation so claimed therein; and, unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from the party so entitled, the same shall be settled by arbitration in the manner herein provided; or, if the party so entitled as aforesaid desire to have such question of compensation settled by a jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid, and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall within twenty-one days after the receipt of such notice issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided, and in *default thereof they shall be liable to pay to the party so entitled as aforesaid the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior courts." No time being specifically fixed for making an

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offer, it is sufficient if the company make it in a reasonable time before the inquiry. Here, the magistrate has found that the offer was made within a reasonable time. The 34th section provides for the costs in cases of arbitration,—"All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." The 51st section provides for the costs of an inquiry before a jury,—"On every such inquiry before a jury, where the verdict of the jury shall be given for a greater sum than the sum previously offered by the promoters of the undertaking, all the costs of such inquiry shall be borne by the promoters of the undertaking; but, if the verdict of the jury be given for the same or a less sum than the sum previously offered by the promoters of the undertaking, or if the owner of the lands shall have failed to appear at the time and place appointed for the inquiry, having received due notice thereof, one half of the costs of summoning, impannelling, and returning the jury, and of taking the inquiry and recording the verdict and judgment thereon, in case such verdict shall be taken, shall be defrayed by the owner of the lands, and the other half by the promoters of the undertaking, and each party shall bear
*220] his own costs, other than as aforesaid, incident to such inquiry." *Throughout the act there is only one provision as to the time of making the offer; and that refers to a different case from this. The 38th section not applying, the time for giving notice is left at large, as the time for making the offer in cases of arbitration always is; consequently it is enough if it is a reasonable time. The words "previously offered," mean within a reasonable time before the injury, not before the issuing of the warrant. The case of Yates v. The Mayor, &c., of Blackburn, 6 Hurlst. & N. 61, which was referred to before the magistrate, is clearly no authority in support of the claim to these costs; the court there expressly decline to lay down a rule as to the time within which the tender must be made, to relieve the party making it from costs by virtue of the 34th section. In Railstone *v.* The York, Newcastle, and Berwick Railway Company, 15 Q. B. 404, it was held by the majority of the court that the 38th section does not apply where the lands have been taken, and the claimant proceeds under s. 68.

Manisty, Q. C., contrà.—The argument on the other side is, that where a claim is made under the 68th section of the Lands Clauses Consolidation Act for compensation in respect of lands injuriously affected by the execution of works, it is open to the promoters at any time before the inquiry commences to make an offer to the claimant subject only to the qualification that the time must be reasonable. If that be so, the reasonableness of the notice will be matter of dispute in all cases: and before whom is that to be contested? Is it to be before the master, or before the magistrate, or before the court? In all cases where notices are by law required,—as, for instance, notices of trial, or of appeal or removal, a certain time is fixed. The incon-

venience of a contrary rule is *manifest. Assuming the 38th section to be out of the question, the seven days' notice given here must at all events be unreasonable. Under s. 68, where the claimant gives notice of his desire to go before a jury, the company have *twenty-one days* within which to signify their assent, or to issue their warrant. By s. 41 the sheriff is required within a period of not less than *fourteen* or more than *twenty-one* days to summon a jury. And by s. 46 not less than *ten* days' notice of the time and place of the inquiry shall be given in writing by the promoters of the undertaking to the other party. [WILLES, J.—When do you say the offer must be made?] It may be ten, or fourteen, or twenty-one days before the beginning of the proceedings for ascertaining the amount of compensation; but certainly not less than *ten* days. Under no circumstances can less than ten days be enough. But there can be no reason why the 38th section should not apply to this case. The decision of the master is final, as well as to the liability of the company as with respect to the amount of costs the claimant is entitled to. In a case of In re Ross and the York, Newcastle, and Berwick Railway Company, 5 Dowl. & L. 695, 5 Railway Cases 516, it was held that there was no power to review the taxation in such a case, the costs being referred to the master by the 52d section as an original arbitrator. In the judgment in that case it is said: "Where the court refers the taxation to its officer, it has the power of reviewing it, because the power of the officer is delegated to him by the court, and his act is not effective unless adopted by the court. But the taxation in question is made without any delegation of power from the court, and without any express or implied liability to review. Where the legislature intended the court to have control over the taxation, it has directed such court to *award costs: see s. 80, as to costs where the money has been deposited: s. 83, as to costs of conveyances; and s. 126, as to costs of litigating a title." At all events, the allocatur is final, where there has been no application to review the taxation. [*221] [*222]

H. Lloyd, in reply.—The case finds, that, unless there is a definite point of time provided by the act for giving the notice, the notice here given was given in reasonable time. The argument urged on the part of the respondent might very properly have been addressed to the magistrate, who had to determine what was a reasonable notice; but it can have no avail here. [WILLES, J.—Is not the time virtually fixed by s. 46,—the time when the undertakers finally elect to go to trial? That is the period at which the claimant would be entitled to begin to prepare for the inquiry, by analogy to the procedure in the superior courts, which these courts are assimilated to by s. 43. ERLE, C. J.—It seems that the decision of the master is not final either as to the amount of the costs or the liability of the undertaker to pay costs. We are against you upon both points.]

ERLE, C. J.—This is a case stated for the advice of the court as to the duty of a police-magistrate in levying costs which have been taxed and allowed by the master to a claimant under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. After the most careful consideration of the rights of the respective parties, I am of opinion that the conclusion come to by the magistrate, that he was bound by the

master's allocatur, is right. The claim was made under the 68th section of the statute, in respect of premises of the claimant which were injuriously affected by the execution of the company's works. The
*223] sum claimed *was 1000*l.* Six days before the trial, the company offered 25*l.*, which, if the offer was made in sufficient time, the magistrate found amounted to as much as the compensation given by the jury (20*l.*) and the costs incurred by the claimant up to the time of the tender. The bill of costs delivered to the company amounted to 212*l.*, and the master on taxation allowed 106*l.* The claimant then, after due demand, and non-payment, applied to the magistrate for a warrant under the 53d section of the statute, to enforce the same. I am of opinion that he is entitled to it. The 52d section, under which the master's allocatur is made, enacts that "the costs of any such injury shall, in case of difference, be settled by one of the masters of the Court of Queen's Bench of England or Ireland, according as the lands are situate, on the application of either party, and such costs shall include all reasonable costs, charges, and expenses incurred in summoning, impannelling, and returning the jury, taking the inquiry, the attendance of witnesses, the employment of counsel and attorneys, recording the verdict and judgment thereon, and otherwise incident to such inquiry." The master has settled the amount of costs in this case at 106*l.*: and the magistrate considered that his decision was final. In the case of Ross *v.* The York, Newcastle, and Berwick Railway Company, 5 D. & L. 695, 5 Railway Cases 516. I held in the bail court, that, where costs have been settled by the master under this section, the court has no power to order a review of the taxation,—the costs being by that section referred to the master, not as an officer of the court, but as an independent arbitrator, and that he is to determine the liability as well as the amount. I remember, however, a case in the full court, in the time of Lord Denman (of which I find no report), where it was considered, that, the master
*224] being an *officer of the court, the exercise of whose duties is subject to certain known incidents, his allocatur must be subject to review. It is true, that, in the performance of this particular duty, he is deputed by parliament and not by the court; but I believe I have the sanction of the other members of the court for saying that this latter view is in accordance with the law. Assuming that the taxation is subject to review, if the court sustain it, or there is no application for a review, the allocatur is final.

The next point is this. The magistrate held, that, if it was sufficient that an offer should be made by the company a reasonable time before the holding of the inquiry, although after the issuing by them of their warrant to the sheriff, the offer made on the 30th of December, 1861, was a valid offer within the act. I, however, think that a claim under s. 68 for compensation in respect of lands injuriously affected by the works of the company stands upon a totally different footing from cases where the land has been taken possession of by the company, and they take the initiative in the proceedings towards ascertaining the amount of compensation. The company are to give notice of their intention to take the lands, stating the particulars and that they are willing to treat for the purchase, and for compensation to be made for damage: s. 18. Where the amount of compensation exceeds

50*l.*, it is to be settled by arbitration or by the verdict of a jury: s. 23. The 38th section enacts, that, "before the promoters of the undertaking shall issue their warrant for summoning a jury for settling any case of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned, and in such notice the promoters of the undertaking shall state what sum of money they are willing to give *for the interest in such *lands sought to be purchased* by them from such party, and for the damage to be sustained by him by the execution of the works." That applies to the case of lands to be *purchased* by the company. The provision for making an offer of the sum which the company are willing to give, is wholly inapplicable to the case of compensation for lands injuriously affected by the execution of the works. The company are not supposed to know that the land is or will be injuriously affected, or what may be claimed, and therefore they cannot make an offer. Under s. 68, where they have received notice of a claim for compensation in respect of lands which shall have been taken for or injuriously affected by the execution of the works, and the owner of the lands, claiming more than 50*l.*, desires to have the question of compensation settled by a jury, he must give notice thereof to the company, and, unless they are willing to pay the amount claimed, they must within twenty-one days after the receipt of such notice issue their warrant to the sheriff to summon a jury, or they become liable for the sum claimed. In Railstone *v.* The York, Newcastle, and Berwick Railway Company, 15 Q. B. 404 (E. C. L. R. vol. 69), the Court of Queen's Bench held that under this section the company had twenty-one days to consider what they will offer. But there seems to have been some little difference between that court and this in Richardson *v.* The South Eastern Railway Company, 11 C. B. 154, 20 Law J. C. P. 236 (in error, The South Eastern Railway Company *v.* Richardson, 21 L. J. C. P. 122), as to whether it is to be eleven days or twenty-one. The 46th section provides that not less than ten days' notice of the time and place of the inquiry shall be given in writing by the promoters of the undertaking to the other party. The question before us is, when must the offer be made, in order to relieve the company from the costs of the inquiry *under s. 51. I think "the sum *previously* offered," in that section, according to the suggestion of my Brother Willes in the course of the argument, means the sum offered before the notice of the time and place of inquiry under s. 46, and that section requires not less than ten days' notice. I have no power here to do more than say what I should do if I were the magistrate, and that is that I should hold a six days' notice not to be enough. The language is certainly very vague. The offer is to be *previously* made. Previously to what? Not previously to the day of inquiry; for, that clearly would be unreasonable. It must therefore be previously to the time when the claimant is apprised that he is called upon to prove his claim and consequently to incur expense: and that must be previously to the notice of trial. For these reasons, I am of opinion that the order of the magistrate was correct, and must be enforced.

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WILLES, J.—I am of the same opinion. The fact of the master having made an allocatur which has not been set aside, is fatal to the

case of the appellants. It is clear, under section 52, the master must exercise a judicial discretion to some extent, because under s. 51 the amount of costs to be charged to the promoters of the undertaking is to depend upon a preliminary inquiry as to whether the sum awarded by the jury was more or less than the sum previously offered by the promoters, or whether the owner of the land has appeared. The bare mention of that shows that the master must decide whether it is an occasion on which he is called upon to exercise a discretion to tax or not. Either he is or is not an independent judge as to whether the company is chargeable at all, and also as to the amount of liability. If he be an independent judge, as was held by my Lord in Ross v.
*227] The York, *Newcastle, and Berwick Railway Company, 5 D. & L. 695, 5 Railway Cases 516, he has here settled the question of liability as well as the amount. But if, looking at the other clauses of the statute, and to the fact of the person selected to perform this duty being an officer of the court having certain known functions which are subject to certain known incidents, we come to the conclusion that his decision is subject to an appeal to the court of which he is an officer, then, unless an appeal has been made to the court, the magistrate must hold his decision to be final. It is highly probable, looking at the 36th section, which provides that the submission to arbitration may be made a rule of one of the superior courts, on the application of either of the parties, that the intention of the legislature may not have been to make the master an independent judge. But I should certainly require further time to consider before I took upon myself to decide against the case of Ross *v.* The York, Newcastle, and Berwick Railway Company. Either because the allocatur is final, or because there has been no appeal from it, the magistrate was bound to issue a distress-warrant. I think, by analogy to the decision of the Court of Exchequer in the Hammersmith Rent-Charge Case, 4 Exch. 87, the magistrate here adopted the safest course.

As to the time within which the company are bound to give notice, if it were necessary to decide that, and if that were the sole ground of decision in the case, I should be prepared to follow the rule laid down by the Court of Queen's Bench in Railstone *v.* The York, Newcastle, and Berwick Railway Company, 15 Q. B. 404 (E. C. L. R. vol. 69), viz., that the 38th section is confined in its operation to proceedings taken by the company to acquire lands: in giving their notice under that section, they must accompany it by an offer of the sum
*228] they are willing to give for the interest in the land, *and the damage to be sustained by the owner by the execution of the works. As to the proceeding where without knowing of it the promoters have done injury to persons whose land they have not taken, the owner is the person to set the law in motion. The 68th section seems to be framed for the protection of the company. A claim being made, and the party desiring to have the amount of compensation settled by the verdict of a jury, the promoters have twenty-one days to issue their warrant to the sheriff to summon a jury. If it had been intended that the company were to give a notice within that time, I cannot help thinking that the legislature would have said so. Under the 41st section, the sheriff, having received the warrant, is to appoint a time (not being less than fourteen nor more than twenty-one days

after the receipt of the warrant) and place (not more than eight miles distant from the place where the lands are situate) for holding the inquiry; and he is to give notice thereof, not to the claimant, but to the promoters of the undertaking. They may then pay the amount claimed, or proceed with the inquiry. If they proceed, they do so under s. 46, which provides that not less than ten days' notice of the time and place of the inquiry shall be given in writing by the promoters of the undertaking to the other party. It appears to me that not until then do they elect to proceed, or does the inquiry become a living inquiry. Then and not until then they challenge the claimant to litigation, and for that the offer must be made. It is indifferent, as it seems to me, whether you spell it out of the act of parliament, and say that the offer must be made ten days before the hearing, or that the time must be a reasonable time; for, no offer can be reasonable which is made after the time when the party may have incurred expense in proceeding with the inquiry. However much one may *regret the conclusion in the particular case, it is better to lay [*229 down a general rule.

BYLES, J.—I also am of opinion that the decision of the magistrate was correct. I must confess that my mind has fluctuated somewhat during the argument. It is unnecessary for me to make any lengthened observations after what has fallen from my Lord and my Brother Willes: but I will venture to say that I entirely agree with my Lord, that, unless the legislature expressly enact the contrary, whenever a matter is referred to one of the masters, it is so referred subject to the control of the court of which he is an officer. To disentitle the claimant to costs, where the verdict of the jury is for the same or a less sum than that "previously offered," the offer must precede the inquiry. The statute cannot mean that the offer shall be previous to the hearing. I am satisfied that the true construction of the 51st section is, that the offer is to be made before the *notice* of inquiry, because the warrant is a secret document of which the claimant has no notice. The first thing he has any knowledge of is the notice of inquiry. It is enough to say that the offer here came too late. That which is not expressed in the statute must necessarily be implied.

KEATING, J.—I am of the same opinion. The only court of appeal from the decision of the master, is, the court of which he is an officer. If it were necessary upon the present occasion to decide at what time the offer must be made, I should say the time mentioned by the rest of the court, viz., not less than ten days before the notice of the time and place appointed for the inquiry.

Judgment for the respondent, with costs.

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*SIR THOMAS ASTON CLIFFORD CONSTABLE, Bart., v. NICHOLSON. *April* 27. [*230

To an action of trespass for breaking and entering certain land of the plaintiff, being part of the sea-shore between high and low-water mark in or adjoining the township of Owthorne, and taking gravel, stones, sand, &c.,—the defendant pleaded several pleas of justification, some setting up a right in the inhabitants of the township of Owthorne to take the gravel, &c., to be used for the cultivation and improvement of their land; others claiming it for the neces-

sary repairs of the highways in the township; others setting up a prescriptive right under a thirty or sixty years' user respectively; and others claiming to exercise the right, as parish officer, for the repair of the highways:—

Held, that the pleas were bad: for that, so far as they were capable of being construed as justifying under a custom, such custom would be void, being a claim of a profit a prendre in alieno solo, which can only exist by grant or prescription; and that, if the claim were founded on prescription, it would be equally bad, inasmuch as it was a claim by persons who, not being a corporation, were incapable of taking by grant, and not being claimed in a que estate.

THIS was an action of trespass for breaking and entering certain land of the plaintiff, being part of the sea-shore between high-water mark and low-water mark, in or adjoining the townships of Owthorne and Withernsea, within the seigniory of Holderness, in the county of York, and taking, getting, and digging up from and out of the said land divers quantities of gravel, sand, stones, cobbles, ballast, sea-weed, and other materials of the plaintiff there being, and converting the same to the defendant's own use. The plaintiff claimed 50*l*., and also a writ of injunction to restrain the defendant from the repetition of the said injury, and from the committal by him of any injury of the like kind relating to the said land.

The defendant pleaded the following pleas,—first, not guilty,—secondly, that the said land in the declaration mentioned was not nor is the land of the plaintiff,—thirdly, that, as to the said gravel, sand, stone, cobbles, ballast, sea-weed, and materials, the same were not nor was any part thereof the plaintiff's, as alleged:

Fourthly, that he, the defendant, at the time of the alleged trespasses, was possessed of land in the said township of Owthorne, the occupiers whereof for *thirty years* before this suit had dug and got, and had been used and accustomed to dig and get, and of right ought
*231] to have dug and got, and still of right ought to dig and *get, reasonable quantities of gravel, sand, stones, cobbles, ballast, sea-weed, and other materials from and out of the said land of the plaintiff, to take the same from thence to the said land of the defendant, to be used and consumed on the said last-mentioned land for the cultivation, improvement, and enjoyment thereof, every year, at his and their free will and pleasure, as to the said last-mentioned land belonging and appertaining; and that the said alleged trespasses were a use by the defendant of the said right:

Fifthly,—as in the fourth plea, substituting *sixty* for *thirty* years.

Sixthly, that the defendant, at the time of the alleged trespasses, was one of the inhabitants of the said township of Owthorne, in the said county of York, and that, from time whereof the memory of man was not to the contrary, and at the time of the said alleged trespasses, the inhabitants of the said township had been used and accustomed to have and enjoy, and of right ought to have and enjoy, and still of right ought to have and enjoy, the right to enter upon the said land of the plaintiff, being the sea-shore between high and low-water mark, adjoining the said township, by themselves and their servants, with horses and carts, for the purpose of digging and getting from and out of the said land of the plaintiff gravel, sand, stones, cobbles, ballast, sea-weed, and other materials, and carrying away the same for the purpose of amending and repairing the highways in the said township, when and so often as need and occasion required; that the defendant, being one of the inhabitants of the said township, with the

consent and by the direction of the other inhabitants, committed the said alleged trespasses for the purpose of doing certain necessary repairs to certain highways in the said township; and that the said stones, &c., were used in such repairs.

*Seventhly, a similar plea in respect of the township of Withernsea. [*232

Eighthly, that the inhabitants of the said township of Owthorne, for *thirty years* before this suit, enjoyed as of right and without interruption the right to dig and take gravel, sand, stones, cobbles, ballast, sea-weed, and other materials from the sea-shore between high and low-water mark adjoining the said township, for the purpose of repairing the highways in the said township, when need and occasion required; that he the defendant, at the time of the said alleged trespasses, was an inhabitant of the said township of Owthorne; and that he, with the consent and by the direction of the other inhabitants of the said township, committed the said alleged trespasses in the exercise of the said right.

Ninthly, a similar plea, substituting *sixty* for *thirty* years.

The tenth and eleventh pleas were like the eighth and ninth, substituting Withernsea for Owthorne.

Twelfthly, that, from time whereof the memory of man was not to the contrary, and at the time of the said alleged trespasses, the overseers of the highways of the said township of Owthorne, being the persons charged with the repairs of highways in the said township, had been used and accustomed to have and enjoy, and of right ought to have and enjoy, and still of right ought to have and enjoy, the right to enter upon the said land of the plaintiff, being the sea-shore between high and low-water mark adjoining the said township, by themselves and their servants, with horses and carts, for the purpose of digging and getting from and out of the said land of the plaintiff gravel, sand, stones, cobbles, ballast, sea-weed, and other materials, and carrying away the same for the purpose of amending the highways in the said township when and so often *as need and occasion required; that he the defendant, as the servant, and by the orders and directions of the said overseers, committed the said alleged trespasses for the purpose of doing certain necessary repairs to certain highways in the said township, and that the said stones, &c., were used in such repairs. [*233

Thirteenthly, a similar custom for the overseers of the highways of the township of Withernsea.

Fourteenthly, that the defendant did what was complained of by the plaintiff's leave.

The plaintiff joined issue upon each of the defendant's pleas; and he further said that he sued, not only for the trespasses in the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, and thirteenth pleas respectively admitted and therein attempted to be justified, but also for other trespasses committed by the defendant as in the declaration mentioned, on other occasions, and for other purposes than in those pleas respectively mentioned.

He also demurred to the sixth, seventh, eighth, ninth, eleventh, twelfth, and thirteenth pleas, the ground of demurrer stated in the

margin being, "that the alleged rights in those pleas respectively mentioned are not such as can exist or be supported in law."

Joinder in demurrer, and plea of not guilty to the new-assignment; and issue thereon.

Kemplay, in support of the demurrer.—A decision upon the sixth plea will dispose substantially of the whole case. That plea alleges that the defendant was one of the inhabitants of the township of Owthorne, in the county of York; that, from time whereof, &c., the inhabitants of that township had a right to enter the land in question, being the sea-shore between high and low-water mark, for the purpose of taking gravel, &c., for the necessary repair of the highways *in the township; and that the defendant, being one of the inhabitants, with the consent of the other inhabitants, committed the alleged trespasses for that purpose. That is clearly a bad plea. All the cases, from Gateward's Case, 6 Co. Rep. 59 b (Smith *v.* Gatewood, Cro. Jac. 152). downwards, show that, where an interest or profit à prendre, as is this, is to be claimed out of another man's soil, it must be alleged by way of prescription, and not by custom. Even as a custom, it would be bad: Blewitt *v.* Tregonning, 3 Ad. & E. 554 (E. C. L. R. vol. 30), 5 N. & M. 308. [BYLES, J.—The difficulty is, who is to release it?] In 1 Wms. Saund. 340 c, n. (3), it is said: "The defendant must either prescribe in the corporation for the right of common, or else that he and all those whose estate he has in a house in the borough have used to have common; but it cannot be claimed by *custom* that every *tenant*, *inhabitant* or *occupier* of any messuage within the borough has been used to have common; for, it is settled, that, where an interest or profit à prendre is to be claimed out of another man's soil, it must be alleged by way of *prescription*, and not by *custom*, unless in the case of a copyhold tenant against his lord.(*a*) And one chief objection against claiming such a right by custom, is, that it cannot be released; whereas, if it be annexed to the fee, it may,"—referring to Gateward's Case, and Grimstead *v.* Marlowe, 4 T. R. 717, and Hardy *v.* Hollyday, there cited. In Abbot *v.* Weekly, 1 Lev. 176, in trespass for breaking the plaintiff's close, the defendant prescribed for a right in all the inhabitants of a certain ville to dance in the locus in quo at all times of the year at their free will, for their recreation: and the custom was held good, the court saying that "il est necessary *per inhabitants daver recreation." On the same ground a custom "for all the inhabitants of a parish to play at all kinds of lawful games, sports, and pastimes in the close of A. at all seasonable times of the year at their free will and pleasure," was held good in Fitch *v.* Rawling, 2 H. Bl. 393. Tindal, C. J., in delivering the judgment of the Exchequer Chamber in Lockwood *v.* Wood, 6 Q. B. 50, 64 (E. C. L. R. vol. 51),—where the question was whether the inhabitants of a town could under a modern grant claim exemption from stallage in a market,—says: "The claim in this case is not simply to be exempt from toll properly so called, but from a species of payment which, although included in the word toll in the deed in question in this case, is a compensation for the use of land: and the true nature of the claim of the inhabitants under the deed is, a claim to a grant of the easement of going on the plaintiff's land and

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(*a*) And see per Holroyd, J., in The King *v.* Churchill, 4 B. & C. 755, 6 D. & R. 635.

pitching their stalls there on market-days, without paying anything for the use of the soil. And, upon referring to the several authorities which have been cited in support of the validity of such a prescription, it will be found that the claim by the inhabitants, quà inhabitants, to any easement, wherever it has been allowed, has been invariably rested on the ground of custom, not on that of prescription. A custom which has existed time immemorial without interruption in a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is, in effect, the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to look out for its origin: but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus, a **custom* for all fishermen within a certain district to dry their nets upon the land of another, [*236 might well be a good custom, as it was held in 5 Co. Rep. 84;(a) and yet a *grant* of such an easement to fishermen within the district eo nomine might well be held void." In The Mayor, &c., of Linn Regis *v.* Taylor, 3 Lev. 160, a custom for freemen and proprietors of ships to dig ballast on the shore, was held good—it being for the maintenance of navigation, and so pro bono publico. The eighth plea claims the right by thirty years' enjoyment: whereas, the highways may be modern; they may have been dedicated within a year. [WILLES, J., referred to Wilson *v.* Willes, 7 East 121.]

Milward (with whom was *R. E. Turner*), contrà.—These pleas claim the right by custom as well as by prescription: it is enough for the defendant if either can be sustained. The case of Clowes *v.* Beck, 13 Beavan 347, 20 Law J. Ch. 505, shows that this is at least a moot question: and Padwick *v.* Knight, 7 Exch. 854, leaves it at all events in doubt. The pleas here were carefully framed in order to avoid the difficulty which arose in the last-mentioned case. In Johnson *v.* Wyard, 2 Lutw. 1344, there was a plea of a custom for the inhabitants of Horningsheard, in the county of Suffolk, to take gravel from a gravel-pit "pur reparacon. altarum Regiarum viarum in parochia prædicta," which is very like the custom claimed here: but it ultimately came to nothing; for, the report says that the case was appointed for argument in the ensuing term, "sed partes inter se concordaverunt." In Bond's Case (there cited), March 16, it was held that "custome à prendre rushes à strewer l'esglise, est bon." *[WILLES, J.— That case does not help you: it was a mere easement; and the [*237 decision was not considered satisfactory even at that time.] The case of The Mayor, &c., of Linn-Regis *v.* Taylor is very analogous to the present. In giving judgment, the court say,—"A custom is lex loci, and inherent in the soil whereto 'tis fixed for the service of every one that is qualified to use it; whereas prescription is (fixed) in the person, and therefore ought always to be laid in persons or estates of perpetual existence; but 'tis otherwise of customs, as the custom for fishermen to dry their nets on another's soil, and the custom of the hundred of Wicksworth, in Derbyshire, to dig for lead in another's soil

(a) This reference is incorrect: the reporters in a note suggest that Bro. Abr. *Customs*, pl. 46, was intended.

so far as the party can throw his mattock." The judgment of Lord Ellenborough in Wilson *v.* Willes, 7 East 121, shows that the custom there(*a*) would have been good if claimed within reasonable limits: and the judgment of Lord Tenterden in Oxenden *v.* Palmer, 2 B. & Ad. 236, shows that a custom to take shingle from the sea-beach for the repairs of the highways of a parish may be sustained. Clayton *v.* Corby, 5 Q. B. 415 (E. C. L. R. vol. 48), 2 Gale & D. 174, is to the
*238] same effect. A right to take coal in another man's *land may be claimed by prescription: Wilkinson *v.* Proud, 11 M. & W. 33. [WILLES, J., referred to The Marquis of Salisbury *v.* Gladstone, 6 Hurlst. & N. 123, where it was held that a custom in a manor that the copyholders of inheritance may, without license from the lord of the manor, break the surface and dig and get clay without limit in, upon, and from and out of their copyhold tenements, for the purpose of making bricks, to be sold by them off the manor, is good in law.(*b*)] Peppin *v.* Shakspear, 6 T. R. 748, and Rogers *v.* Brenton, 10 Q. B. 26 (E. C. L. R. vol. 59), are also authorities to show that such a claim of profit in alieno solo may be sustained, if well pleaded. [ERLE, C. J.—The claim in the last-mentioned case was afterwards held to be too uncertain.] A custom for a victualler to enter the lord's waste in the time of a fair, to erect a booth for carrying on his trade, paying 2*d.* to the lord, was held to be reasonable: Tyson *v.* Smith, 9 Ad. & E. 406 (E. C. L. R. vol. 36), 1 P & D. 307. So, in a highway: Elwood *v.* Bullock, 6 Q. B. 383 (E. C. L. R. vol. 51.) In Pain *v.* Patrick, 3 Mod. 289, 292, a custom for the inhabitants of a vill to claim to be discharged from toll ratione commorantiæ, was upheld. And in Race *v.* Ward, 4 Ellis & B. 702 (E. C. L. R. vol. 82), a custom, from time immemorial, for all the inhabitants of the township in which the plaintiff's close was situate, to take water from a well or spring in that close, and carry the same to their houses, to be used for domestic purposes, was held good. [WILLES, J.—That is not a profit a prendre, like the taking of fish in the waters of another.] It shows that the custom is well laid in all the inhabitants. The ground of the decision in Blewett *v.* Tregonning, 3 Ad. & E. 554 (E. C. L. R. vol. 30), 5 Nev. & M. 308, was, that the claim was for the private advantage of the
*239] parties setting it up; whereas, this is a custom for the benefit *of the public,—for the repair of the Queen's highways.

Kemplay was not called upon to reply.

ERLE, C. J.—In this case the plaintiff has brought his action against the defendant for breaking and entering certain land of the plaintiff, being part of the sea-shore between high and low water mark, in or adjoining the township of Owthorne, and taking gravel, stones, sand, &c. The defendant has pleaded several pleas of justification, some

(*a*) The claim was of a custom "that all the customary tenants of a manor having gardens parcels of their customary tenements respectively had immemorially, by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass-plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle as had been fit and proper to be so used, at all times of the year, as often and in such quantity as occasion hath required;" and also a custom for applying such turf "for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences of such customary tenements."

(*b*) And see Blewett, app., Jenkins, resp., 12 C. B. N. S. p. 16 (E. C. L. R. vol. 104).

setting up a right in the inhabitants of the township of Owthorne to take the gravel, &c., to be used for the cultivation and improvement of their land; others claiming it for the necessary repairs of the highways in the township; others setting up a prescriptive right under a thirty or sixty years' user respectively; and others claiming to exercise the right as parish officer for the repair of the highways. So far as these pleas are capable of being construed as justifying under a custom, it is clear that the custom would be void. It is a claim of a profit a prendre in alieno solo. Now, the general doctrine, as laid down in the notes to Mellor *v.* Spateman, 1 Wms. Saund. 339, and in the judgment of Tindal, C. J., in Lockwood *v.* Wood, 6 Q. B. 50 (E. C. L. R. vol. 51), is, that such a claim can only be alleged by way of prescription. The authorities sought to be relied upon on the other side entirely fail. In Clowes *v.* Beck, 13 Beavan 347, 20 Law J. Ch. 505, there was no judgment on the point. In Padwick *v.* Knight, 7 Exch. 854, there is a sort of suggestion thrown out that "it is by no means clear that there might not be a good prescription in the inhabitants of a parish to take stones from the waste for the repair of the highways." In Johnson *v.* Wyard, 2 Lutw. 1344, there are the arguments of counsel for *and against the validity of such a custom: but it terminates in absolute uncertainty. In Oxenden [*240
v. Palmer, 2 B. & Ad. 236 (E. C. L. R. vol. 22), the custom was denied: and the only point decided, was, that the witness was not admissible. So that there appears not to be a shadow of authority to support the affirmative of the proposition. Then, can the pleas which set up a prescriptive claim be sustained? I think a valid answer has been given to that also. The claim by the inhabitants and by the overseers of the township is a claim by persons who are incapable of taking a grant, not being a corporation: neither do they claim in a que estate,—alleging the right to be in the owners of an estate of which they are the occupiers. That is one answer, and a sufficient one. If need were, we might go into a consideration of the kind of right which is claimed. But it is enough to say that it is clearly bad whether as a custom or as a claim by prescription, and consequently the plaintiff is entitled to our judgment.

WILLES, J.—I am of the same opinion. As far as the right is claimed by custom, if any such exist, it is clearly bad. The distinction is well established, that by custom you may claim an easement to be enjoyed over the land of another, but you cannot claim a profit out of the land. The only difficulty in these cases, is, to ascertain what is a profit a prendre, and what an easement. All the authorities which have a tendency to show that there may be a custom for a profit a prendre in alieno solo must be considered as overruled. No case has been cited where any court has directly decided that a custom for a profit could be good. The only thing that approaches to an authority is the dictum in Bond's Case, March 16, as to the custom to take rushes to strew the church. But that case is *doubted by the [*241
reporter at the time. This is clearly not a claim for an easement: it is a claim to take the soil. The pleas, therefore, founded on custom fail. I am of opinion that the pleas which are assumed to set up a claim by prescription also fail. To make out a prescriptive right, you must show that it is claimed out of land; or, if in grant,

that it is claimed by a body corporate, or that it descended from ancestor to heir. At common law, it may be claimed in a que estate. There must be a unity and a continuance. You cannot otherwise get rid of the necessity of a conveyance to grant it from one to another. Here, the inhabitants of the townships of Owthorne and Withernsea are not stated to be corporations. If the case should come to trial, Mr. Kemplay should take care to have the verdict special as to that. It is impossible to make the leap we are invited by Mr. Milward to do, and assume that they were a corporation from the time of Richard the First. It therefore simply comes to this,—a claim of prescription for the fluctuating body of the inhabitants of a township. I would refer to the case of Bailey *v.* Stephens, 12 C. B. N. S. 91 (E. C. L. R. vol. 104), for the reasons why a claim of that sort is bad; and, as those reasons have been so recently given in this court, I need not repeat them here. I by no means say that this prescription is not open to other objections than those I have pointed out.

BYLES, J.—I am of the same opinion. This is an attempt to disturb ancient foundations of the law. It is plain that the sixth plea seeks to set up a right to a profit a prendre in the largest sense. The defendant claims the right, as an inhabitant of the township of Owthorne, to enter upon the land in question and dig and carry away gravel, sand, &c., for the necessary repair of the highways in the town-
*242] ship. That plea in *terms relies on custom. Even in the pleas which profess to be founded on the Prescription Act, 2 & 3 W. 4, c. 71, I see nothing to show that they are founded on prescription rather than on custom. There may be very good reasons why the defendant did not claim by prescription: he does not claim as a corporation, nor in a que estate. If anything, it is by custom: and that reduces it to this narrow point,—can there be a good custom to take the soil of another man's land? The law has been clear ever since Gateward's Case, 6 Co. Rep. 59 b, that there cannot. And no case has been cited where the contrary has been held. The utmost that can be said, is, that in one case the distinction was not attended to. It is quite clear that a profit a prendre in alieno solo cannot be claimed by custom.

KEATING, J.—I am entirely of the same opinion. Whether the right here is claimed by custom or prescription, it is equally bad.

Judgment for the plaintiff.

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*243] *THE SOUTHAMPTON DOCK COMPANY *v.* HILL.

April 24.

The Southampton Dock Company are empowered by their act, 6 W. 4, c. xxix., s. 149, to charge for the landing of goods in their docks the several sums mentioned in the schedule thereto annexed, and for articles not therein particularized such sums as shall be equal to the sums affixed on goods, &c, "of a similar nature, package, value, and quality," in the schedule. All the charges mentioned in the schedule were of small fixed sums,—none being ad valorem except the charge for "sculptured marble:"—

Held, that the company were not entitled to make an ad valorem charge for the landing of goods not enumerated or at all approaching in "nature, value, and quality" to those enumerated in the schedule.

BY the 149th section of the Southampton Dock Act, 6 W. 4, c.

xxix., it is enacted that "the said company shall and may take or receive for every article of goods, wares, or merchandise whatsoever, whether subject to any duties of Customs or Excise, both on either, or not, which shall be landed or deposited within or shipped from the said dock premises, such rates, rents, or sums, not exceeding the several rates, rents, or sums specified and set forth in the schedules C. and D. hereunto annexed (so far as such goods, wares, and merchandise are particularized in such schedules) for or in respect of the wharfage, shipping, unshipping, landing, re-landing, housing, re-housing, weighing, and delivering any such article, as the said company or the directors thereof shall from time to time appoint; and that the said company shall or may take or receive for every article of goods, wares, or merchandise not particularized and set forth in the said schedules C. and D. which shall be landed or deposited within or shipped from the said dock premises, for and on the accounts aforesaid, such rate, rent, or sum as shall be equal to the rate, rent, or sum rated or affixed on goods, wares, and merchandise of a similar nature, package, value, and quality in and by the said schedules C. and D."

The schedules above referred to related respectively to exports and imports. The import schedule, C., contained, amongst others, the following charges for the landing of the goods enumerated:—

"Amethysts or agates. Case or package, 1*s.* 6*d.*
"Bullion. Cask or case, 1*s.* 6*d.*; small package, 1*s.*; package not exceeding 5*l.* value, 6*d.*
"Chairs. Case containing twelve, 1*s.* 6*d.*
"China ware. Case, 1*s.* 6*d.*; small case or box, 1*s.*
"Furniture. Very large package, 4*s.* 6*d.*; ordinary package, 3*s.*; middling package, 2*s.*; intermediate packages, 1*s.*; small package, 6*d.*
"Glass. Cask or chest, 1*s.* 6*d.*; case or box, 1*s.*
"Glass utensils. 2½ cwt. and upwards, 2*s.*; 1 cwt., and under 2½ cwt., 1*s.* 6*d.*; under1 cwt. 1*s.*
"Marble. Sculptured works of art, and slabs, *according to size* and *value.*
"Pianofortes, each, 4*s.* 6*d.*
"Pictures. Bale or case, 4*s.* 6*d.*; middling bale or case, 3*s.*; small bale or case, 1*s.* 6*d.*; extra-sized bales or cases to be charged according to dimensions and contents.
"Porcelain. Case, 1*s.* 6*d.*; small case or box, 1*s.*
"Prints. Engravings; large case, 1*s.* 6*d.*; middling case, 1*s.*; small case 6*d.*
"Shawls. Small box or bale, 2*s.*; large, 3*s.*"

The defendant was the consignee by the Peninsular and Oriental Steam-Navigation Company's ship Pera, from Constantinople, of two small packages, containing a magnificently jewelled looking-glass valued at 4600*l.*, and a stereoscope valued at 2600*l.*, the property of the Sultan, which had been sent over by him to be placed in the Great Exhibition at Kensington. Finding nothing in the schedule to which these articles could be aptly compared, the company claimed for the landing of them an ad valorem charge of 2*l.* 7*s.* 6*d.* per 1000*l.*, and 1*s.* for opening the packages, making together 17*l.* 8*s.*; and, upon the defendant's refusing to comply with their demand, they brought this action.

The defendant paid into court the sum of 40*s.*

At the trial before Willes, J., at the sittings in London after last Michaelmas Term, it was insisted on the part of the defendant that the company were bound by the scale of charges mentioned in the

schedule to the act, and were not warranted in making an ad valorem charge.

*245] *Under the direction of the learned judge the jury found for the plaintiffs for the amount claimed, subject to leave reserved to the defendant to move to enter the verdict for him, if the court should be of opinion that enough had been paid into court to cover the plaintiffs' legal claim.

Montague Smith, Q. C., in Hilary Term last, obtained a rule nisi accordingly.

Lush, Q. C., and *T. Jones*, now showed cause.—The articles in question were articles of a costly and exceptional nature. The schedule contains nothing of a similar kind by which the charge is to be regulated. There is no express prohibition against the company charging a reasonable sum in respect of things not found in the schedule; and this charge was based upon that which they have always made in respect of plate and jewels. Jewels are not mentioned, with the exception of amethysts, which are charged by the case or package,—evidently referring to the article of commerce, which is imported in the rough. Strictly speaking, amethysts are not precious stones, such as diamonds, rubies, and emeralds. Indeed, all the articles enumerated in the schedule are articles of commerce, as to which the sole guide to the charge for landing and warehousing is weight and space occupied. Diamonds go in a very small compass. Can it be contended that the company are only entitled to charge 1*s.* or 1*s.* 6*d.* for a package of diamonds which may be worth many thousand pounds? If the contention on the other side be well founded, and these costly articles are to be classed with "furniture," the company would only get 6*d.* per package for all the responsibility they incur in respect of them. The furniture contemplated by the schedule must be ordinary

*246] *articles of household furniture. The things in the schedule which the most nearly resemble those now in question, are, sculptured works of art, which are to be charged for according to size and value. If these articles are not actually or by reference impliedly in the schedule, the company are not bound to receive them, except under an implied contract to be paid what is reasonable for their services for landing them.

M. Smith, Q. C., and *H. James*, in support of the rule.—The question turns entirely upon the construction of the 149th section of the company's act. They can only justify a charge which is authorized by the act. Their rights in this respect are defined and limited by the language of the section which empowers them to make the charge. Throughout the act and the schedule, with the exception only of sculptured articles and bullion, value is altogether ignored as the test of the rate. A single picture may be worth 20,000*l.* and yet a bale or case of pictures may be landed for 4*s.* 6*d.* or less. Value, therefore, is no criterion. What is there to prevent the articles in question from being classed as "furniture?" The looking-glass was an article for use,—an extravagant one, no doubt: but it is not the less furniture because it is exceedingly beautiful and valuable. [WILLES, J.—Would you call the stereoscope an article of furniture?] It would be difficult to find any other head in the schedule under which to class it. Everything that is chargeable is chargeable by the sched-

ule. For articles not specifically enumerated therein, there is an express provision that the company shall receive for them such rate or sum as shall be equal to the rate or sum affixed on goods of a similar nature, package, value, and quality in the schedule. Upon this construction, *the 40*s.* paid into court abundantly covers all that the plaintiffs were entitled to demand. [*247

ERLE, C. J.—The dock company have made their charge for the landing of the articles in question according to value. They certainly ought in some way to be compensated in proportion to the greater risk which they incur in consequence of the large value of the goods; and so estimating it, the charge they have made is not an unreasonable one. But the question which we have to consider, is, whether that charge is warranted by the 149th section of the 6 W. 4, c. xxix. That section empowers the company to take or receive for every article of goods, &c., landed by them within the dock premises such rates or sums, not exceeding the several rates or sums set forth in schedule C. to the act annexed, as the directors shall from time to time appoint; and then it goes on to say that they may take or receive for every article of goods, &c., not particularized in the schedule, which shall be landed by them, such rate or sum as shall be equal to the rate or sum rated or fixed on goods, &c., "of a similar nature, package, value, and quality" in the schedule. If the articles in question had been particularized in the schedule, the company could only have demanded the sum fixed therein. But, these being articles the like of which had never before been imported into Southampton, they are not particularized in the schedule. We are therefore compelled to look at the schedule to see if we can discover any article therein mentioned of "a similar nature, package, value, and quality." But there is nothing in the schedule which at all resembles these goods. Furniture is mentioned; but that could hardly be said to apply to ornamental articles of the great value of these. Still, there is nothing in the act to authorize a charge proportioned *to the value of the articles,—except sculpture. I feel bound, therefore, to give judgment against the company. Thinking the charge a reasonable one, I have tried with my utmost power to sustain it; but I am unable to see anything in the schedule to afford a foundation for it. [*248

The rest of the court concurring, Rule absolute.

WHISTLER *v.* FORSTER. *April* 24.

A check drawn payable to A. B. *or order*, on demand, is a bill of exchange liable only to the stamp-duty of 1*d.* imposed by the 16 & 17 Vict. c. 59,—the provisions of the 55 G. 3, c, 184, s. 13, and 21 & 22 Vict. c. 20, being applicable only to drafts payable to *bearer* on demand: consequently, the fact of such an instrument being post-dated does not render it invalid.

One who receives a bill of exchange unendorsed (though for value) acquires no better title under it than the person from whom he receives it himself has.

Where, therefore, A. had fraudulently obtained a bill (or check *payable to order*) from B., and handed it to C. in satisfaction of a bonâ fide debt, but without endorsing it,—Held, that C. could not acquire a legal title to sue upon the instrument, by obtaining A.'s endorsement after he had received notice of the fraud.

THIS was an action by the endorsee against the maker of a check

for 97*l.* 10*s.* drawn by the defendant payable to A. S. Griffiths & Co., or order, and endorsed by A. S. Griffiths & Co. to the plaintiff.

The defendant traversed the making and endorsement of the check, and also pleaded that he the defendant was induced to make the check by and through the fraud of Griffiths & Co., and that there never was any value or consideration for the endorsement of the same to the plaintiff, or for his holding the same, and that he had notice of the premises before and when the same was first endorsed to him, and took the same from Griffiths & Co. with such notice. Issue thereon.

The cause was tried before Willes, J., at the sittings in London after last Hilary Term, when the following facts appeared in evidence:—The check in question, which bore a 1*d.* stamp, was drawn by the defendant some day before the 3d of October, 1862. and handed *249] *by him to Griffiths upon an understanding that it was not to be presented for payment until the 4th, and an undertaking by Griffiths to furnish the defendant with funds to meet it early on the morning of that day, which however he failed to perform. Griffiths on the 3d gave the check to the plaintiff for value, but did not then endorse it. At the time he received the check, the plaintiff had no notice of the way in which Griffiths had obtained it from the defendant, but before he obtained the endorsement of Griffiths he had such notice.

On the part of the defendant it was submitted that the plaintiff could not recover upon the check,—first, because it was post-dated, —secondly, because, before he obtained Griffiths's endorsement, the plaintiff had notice of the fraud practised by Griffiths upon the defendant.

The learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiff to move to enter a verdict for him if the court should be of opinion that the check, though post-dated and unstamped (otherwise than with the penny stamp imposed by the 21 & 22 Vict. c. 20, s. 1), was a valid instrument, and that the plaintiff had a sufficient interest in the check to entitle him to sue upon it before he received notice of the alleged fraud.

H. James, in Hilary Term last, obtained a rule nisi accordingly.—He cited Smith *v.* Pickering, Peake, N. P. C. 50, and Anonymous, 1 Campb. 492, n. [WILLES, J., referred to Edge *v.* Bumford, 31 L. J. Ch. 805.]

Karslake, Q. C., and *Macnamara*, now showed cause.—Under the old act 55 G. 3, c. 184, a post-dated check was void. The 13th sec- *250] tion of that statute, "for the *more effectual preventing of frauds and evasions of the duties thereby granted on bills of exchange, drafts, or orders for payment of money, under colour of the exemption in favour of drafts or orders upon bankers or persons acting as bankers, contained in the schedule thereunto annexed," enacted, that, "if any person or persons shall, after the 31st of August, 1815, make and issue, or cause to be made and issued, any bill, draft, or order for the payment of money to the bearer on demand, upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not in

every respect fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this act, the person or persons so offending shall, for every such bill, draft, or order, forfeit the sum of 100*l.*," &c. The 21 & 22 Vict. c. 20, which imposes the stamp duty on checks, enacts (s. 1), that "all drafts or orders for the payment of any sum of money to the bearer on demand, which, being drawn upon any banker, or any person or persons acting as a banker, and residing or transacting the business of a banker within fifteen miles of the place where such drafts or orders are issued, are now exempt from stamp-duty, shall be chargeable with the stamp-duty of 1*d.* for every such draft or order." And s. 2 enacts that "all the powers, provisions, and regulations, pains and penalties, contained in or imposed by any act or acts relating to any duties of the same kind or description payable in Great Britain and Ireland respectively, and in force at the time of the passing of this act, shall respectively be in full force and effect with respect to the duty by this act granted, and to the paper and instruments chargeable *therewith, so far as the same are or shall be applicable, and shall [*251 be observed, applied, enforced, and put in execution for and in the collecting and securing of the duty hereby granted, and otherwise in relation thereto, so far as the same shall be consistent with the express provisions of this act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted with reference to the duty by this act granted." By the 17 & 18 Vict. c. 83, Sched. title *Inland Bill of Exchange*, a bill for this amount (payable at any time otherwise than on demand,—which is the effect of a post-dated draft or order) would be chargeable with a duty of 1*s.* The 16 & 17 Vict. c. 59, imposed a duty of one penny on a "draft or order for the payment of any sum of money to the bearer or to order, on demand:" but it contained the same exception as the 55 G. 3, c. 184, in favour of "drafts or orders for the payment of money to the bearer on demand, drawn upon any banker or bankers, now by law exempt from stamp-duty." The check in question being dated on the 4th of October, the bankers would not pay it before that day: but, as between the parties, it was intended from the time it was given to be a valuable security, and operated as a bill of exchange. It is clear that the old act invalidated such an instrument. In Byles on Bills, 8th edit. 16, it is said: "It might seem that a check may now be post-dated. But such a conclusion is very doubtful, for, a post-dated check is not in strictness originally payable on demand, and one object of legislation may have been to prevent checks circulating as paper-money." In Dunsford *v.* Curlewis, 1 Fost. & Fin. 702, Hill, J., assumed a post-dated check to be void. [WILLES, J.—It does not appear whether the check there was payable to bearer or to order.] No doubt it was to the bearer. The like was ruled by Keating, J., in Oliver *v.* Mortimer, 2 Fost. & Fin. 127. [KEATING, J.—In that case the check was payable to *bearer* on demand.] But in Key *v.* Mathias, 3 Fost. & Fin. 279, Bramwell, B., ruled that a post-dated check was admissible without a bill-stamp. [WILLES, J. —The 55 G. 3, c. 184, s. 13, only applied to drafts payable to *bearer* on demand: there is no such provision as to bills or drafts payable to *order* on demand. Now, in the case of bills of exchange, it has

been held, in Williams v. Jarrett, 5 B. & Ad. 32 (E. C. L. R. vol. 27), 2 N. & M. 49, and other cases, that the court can only look to the date appearing on the face of the instrument. That, no doubt, was the ground of my Brother Bramwell's ruling in Key v. Mathias, 3 Fost. & Fin. 279.(a)]

Then, was there such a title in the plaintiff by the subsequent endorsement of the check as to entitle him to maintain the action? It appears that the defendant had been defrauded of the check by Griffiths. The plaintiff received it bonâ fide from Griffiths. At the time it was handed to him by Griffiths it was not endorsed. The want of endorsement becoming apparent, the plaintiff, on the day the check was payable, but after he had received from the defendant an intimation of the fraud which had been practised upon him, went to Griffiths and obtained his endorsement; and then the plaintiff's title became apparently complete on the face of the document. Under these circumstances, it is submitted, the plaintiff cannot recover, and that the endorsement of the check by Griffiths after the plaintiff had had notice of the fraud was of no operation to give him a better title to the check than Griffiths himself had. According to the case of Edge v. Bumford, 31 Law J. Ch. 805, the plaintiff had no remedy in equity
*253] against the defendant before the *endorsement. Watkins v. Maule, 2 Jac. & W. 243, will be relied on for the purpose of showing that a court of equity would have compelled Griffiths to endorse the check, the plaintiff having taken it for value. But that case is no authority to show that the defendant, who had at least equal equity with the plaintiff, could be made liable to one who had notice of the fraud before his legal title was complete. [WILLES, J.—It seems to come to this, that an assignee of a chose in action is in the same position in equity as at law. He cannot have a better right than the assignor: see Watts v. Porter, 3 Ellis & B. 743 (E. C. L. R. vol. 77), which has been followed by a series of cases.] Griffiths could have maintained no action upon the check; so neither can the now plaintiff.

H. James, in support of his rule.—The 55 G. 3, c. 184, s. 13, did not apply to a draft shaped as a bill of exchange: and under the 16 & 17 Vict. c. 59, this being a bill of exchange payable on demand, it is properly stamped. [ERLE, C. J.—You may address yourself to the other point: we have come to the conclusion that this instrument is a bill with a proper stamp.] It is conceded, that, before the endorsement actually took place, the plaintiff had notice substantially of the matters stated in the special plea: but it is submitted that the act of endorsement, which was a mere formality which was accidentally omitted when the transfer of the check took place, must have relation back. [ERLE, C. J.—I have no very accurate perception of what is meant by a formality. A man's signing his name to a deed conveying the fee simple of half a county is in one sense a formality.] No doubt the endorsement was essential to enable the plaintiff to bring an action upon the instrument. But that is not the question.
*254] In Chitty on Bills, 10th edit. 167, it is said, *that, "if a party has delivered a bill without endorsing it, when it was intended that he should do so, a bill may be filed in equity to compel him, or

(a) See Tilsley's Stamp Laws 145, 169, 170.

his assignees if he has become bankrupt, to endorse; and a special action on the case might be maintained against him for refusing to endorse: and if a bill has been delivered before it is due, a formal endorsement may be made at any time after it is due, even by the administrator of the party by whom it was delivered:" and for these propositions the cases of Rose *v.* Sims, 1 B. & Ad. 521 (E. C. L. R. vol. 20), and Watkins *v.* Maule, 2 Jac. & W. 242, are cited. In Smith *v.* Pickering, Peake's N. P. C. 50, it was held, that, if a trader deliver over a bill for a valuable consideration to another and forget to endorse it, he may endorse it after he has become a bankrupt. And, where a bill was delivered with the intent of transferring the property more than two months before a commission issued, but was not actually endorsed till within the two months, Lord Ellenborough held that the endorsement had relation to the delivery, and that the transaction was within the 46 G. 3, c. 135, s. 1: Anonymous, 1 Campb. 492, n. [WILLES, J.—There is no doubt about that. Nothing passes to the assignees but what the bankrupt is entitled to legally and equitably. But the question here is, whether Griffiths could by endorsing this instrument convey a larger right than he himself had.] In Lempriere *v.* Pasley, 2 T. R. 485, an assignment of goods at sea as a collateral security for a debt, and a subsequent endorsement of a bill of lading, were held to be good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the endorsement of the bill of lading. [ERLE, C. J.—The assignment passed an equitable interest in the goods.] A mortgagee without notice purchasing the first encumbrance, is allowed in equity *to protect his estate against any person having a mortgage subsequent to the first, though he purchases the [*255 first encumbrance after notice of the subsequent mortgage: Marsh *v.* Lee, 1 White & Tudor's Leading Cases in Equity 494. In the notes to Basset *v.* Nosworthy, 2 Tudor's Leading Cases 8, 15, are collected a series of cases pointing out the equitable right of a purchaser to protect himself against a person claiming under a prior equitable title, by getting in the outstanding legal estate. The plaintiff's equitable interest being complete at the time the bill was delivered to him, the subsequent notice cannot be allowed to intercept the acquisition of the legal or formal right. [ERLE, C. J.—I do not see what equitable interest the plaintiff had in the draft as against the defendant.]

ERLE, C. J.—This is an action against the drawer of a bill of exchange,—for, though in form a check, the instrument is for all the purposes of the stamp-acts a bill. The plea is, that the bill was obtained from the defendant by one Griffiths by means of fraud, and that it was endorsed to the plaintiff after he had notice of the fraud. The facts are shortly these:—The instrument was a negotiable instrument which had been fraudulently obtained from the defendant by Griffiths, and had been handed over by Griffiths to the plaintiff in part satisfaction of a debt of a larger amount. But Griffiths, at the time he so handed over the bill to the plaintiff, omitted to endorse it. Under these circumstances, the condition of things was this, that the plaintiff had at that time the same rights as if an ordinary chattel had passed to him by an equitable assignment: he would have all

rights which Griffiths could convey to him. Now, Griffiths having defrauded the defendant of the bill, he could pass no right by merely handing over the bill to another. *According to the law-merchant, the title to a negotiable instrument passes by endorsement and delivery. A title so acquired is good against all the world, provided the instrument is taken for value and without notice of any fraud. The plaintiff's title under the equitable assignment here, therefore, was to be rendered valid by endorsement: but, at the time he obtained the endorsement, he had notice that the bill had been fraudulently obtained by Griffiths from the defendant, and that Griffiths had no right to make the endorsement. Assuming, therefore, that there may be conflicting equities between the plaintiff and the defendant, I think the right should prevail according to the rule of law, and that the plaintiff had no title as transferee of the bill at all.

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Then, as to the stamp. The instrument is drawn payable to order, and not to bearer on demand. Under the Stamp Act, 55 G. 3, c. 184, it would have been a bill of exchange. Then, the 16 & 17 Vict. c. 59, with reference to bills of exchange payable to bearer or to order, instead of the stamp-duty imposed by the 55 G. 3, c. 184, imposes a duty of 1*d.* on a "draft or order for the payment of any sum of money to the bearer or to order, on demand." Therefore, from and after the passing of the 16 & 17 Vict. c. 59, drafts payable to the bearer or to order on demand are liable to a stamp-duty of 1*d.* only; consequently, this instrument was properly stamped. Then came the 21 & 22 Vict. c. 20, imposing a stamp-duty of 1*d.* on a certain class of drafts which had been excepted out of the 16 & 17 Vict. c. 59, viz. "drafts or orders for the payment of any sum of money to the bearer on demand, which, being drawn upon any banker, or any person or persons acting as a banker, and residing or transacting the business of a banker within fifteen miles of the place where such drafts or orders are issued, are now *exempt from stamp-duty." The 21 & 22 Vict. c. 20 does not impose this new duty upon all the instruments which were within the 16 & 17 Vict. c. 59, but is confined entirely to drafts or orders payable *to bearer* on demand; and it is with reference to these only that the provisions and penalties contained in or imposed by former acts relating to stamp-duties are to apply. Such provisions and penalties are not made to apply to drafts or orders payable *to order;* nor has the 55 G. 3, c. 184, s. 13, any reference to such instruments. Then, according to the case of Williams v. Jarrett, 5 B. & Ad. 32 (E. C. L. R. vol. 27), 2 N. & M. 49, to which my Brother Willes referred, the instrument is to be taken to have been drawn according to the date appearing upon the face of it. This instrument, therefore, is properly stamped as a bill of exchange, and, whether post-dated or not, is a valid instrument.

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WILLES, J.—I concur with my Lord as to both points. The first is disposed of by the remark that the statutes 55 G. 3, c. 184, s. 13, and 21 & 22 Vict. c. 20, s. 1, apply only to drafts payable to bearer, which are void if post-dated. Drafts payable to order, not being affected by either of those enactments, fall within the law as to bills of exchange, which have been repeatedly held not to be rendered void by post-dating, though that should have the effect of making the

instrument require a less stamp than if it had been dated correctly and payable at the same time: Williams *v.* Jarrett, 5 B. & Ad. 32, 2 N. & M. 49. Whether the drawer be subject to a penalty or to be sued for the difference of stamp-duty, is a question upon which it is unnecessary to offer an opinion.

As to the second point, the general rule of law is undoubted, that no one can transfer a better title than he himself possesses: Nemo dat quod non habet. To *this there are some exceptions; one of [*258 which arises out of the rule of the law-merchant as to negotiable instruments. These, being part of the currency, are subject to the same rule as money: and if such an instrument be transferred in good faith, for value, before it is overdue, it becomes available in the hands of the holder, notwithstanding fraud which would have rendered it unavailable in the hands of a previous holder. This rule, however, is only intended to favour transfers in the ordinary and usual manner whereby a title is acquired according to the law-merchant, and not to a transfer which is valid in equity according to the doctrine respecting the assignment of choses in action, now indeed recognised and in many instances enforced by courts of law: and it is therefore clear, that, in order to acquire the benefit of this rule, the holder of the bill must, if it be payable to order, obtain an endorsement, and that he is affected by notice of a fraud received before he does so. Until he does so, he is merely in the position of the assignee of an ordinary chose in action, and has no better right than his assignor. When he does so, he is affected by fraud which he knew of before the endorsement.

KEATING, J.—I am of the same opinion. The check in question, being payable to order, was properly stamped for the purpose of being admissible in evidence. The cases cited by Mr. Karslake, where post-dated checks were rejected, proceeded on the ground that they were made payable to *bearer* on demand. They are therefore not applicable here. As to the other point,—I think the plea was made out. The plaintiff sues as endorsee of the bill in question. The plea in substance is, that the defendant was defrauded of it by the person to whose order it is made payable, and that the plaintiff had notice of that fact *before the instrument was endorsed to [*259 him. The question is, when was the bill first endorsed to the plaintiff. It must be recollected that the plaintiff is suing in a court of law, and that the right to sue in a court of law upon a negotiable instrument is not complete without a written endorsement. Now, before the plaintiff's right to sue was rendered complete by a written endorsement, he had notice of the fraud. The subsequent endorsement, therefore, transferred no title to sue. The rule must be discharged. Rule discharged.

IONIDES *v.* THE UNIVERSAL MARINE INSURANCE COMPANY. *May* 2.

Goods consisting of 6500 bags of coffee, valued at 25,000*l.*, on board the ship Linwood, were insured on a voyage from Rio de Janeiro to New Orleans, and thence to New York; the policy containing the following warranty,—"Warranted free from capture, seizure, and detention, and all the consequences thereof or of any attempt thereat, and *free from all consequences of hostilities*, riots, or commotions."

At the time of the ship's departure from Rio, the Northern States of America (called "federals") were at war with the Southern States (called "confederates"). The ship was a federal ship: the cargo the property of neutrals. On his voyage from New Orleans to New York, the master of the Linwood, being out of his reckoning, and supposing that he had passed Cape Hatteras, a dangerous headland on the coast of North Carolina, instead of keeping his course N. N. E., changed it to W., and consequently went on shore about ten miles south of the Cape, without any possibility of getting off again. It appeared that until recently a light had always been kept burning at Cape Hatteras, which in ordinary weather was visible at a distance of from 20 to 30 miles; but that, North Carolina being at this time in the possession of the confederates they had extinguished the light for the purpose of harassing the federal shipping.

The Linwood being thus on shore a short distance from the land, the confederate officers came off to her and took the captain and his papers on shore, and detained him and ultimately the rest of the crew on shore as prisoners.

The wreck took place on the 17th of July. On the 18th, the weather was rough, and nothing could be done. But, on the 19th, certain persons called "wreckers" or "salvors" (officers appointed by the federal government for that purpose) came down and got 150 bags of coffee on shore (apparently) undamaged: and it was proved that they might have got on shore 1000 more, but for the interference of the confederate troops, who wanted to obtain the cargo for themselves. On the 20th, the weather becoming again boisterous, the ship broke up, and all the cargo on board was lost:—

Held, that, under these circumstances, the insurers were liable as for a partial loss in respect of the coffee which remained on board incapable of being saved,—the *proximate* cause of the loss being a peril of the sea, and not the hostile act of the confederate troops in extinguishing the light: but that as to so much of the cargo as was actually saved, and as to that which would have been saved but for the interference of the troops, this was a loss by a "consequence of hostilities" within the warranty, and for this the insurers were not liable.

THIS was an action on a policy of insurance.

The first count of the declaration set forth a policy made by the defendants for 3000*l.*(*a*) upon 6500 bags *of coffee valued at
*260] 25,000*l.*, warranted free from particular average, unless the ship should be stranded, sunk, or burnt,—general average payable as per foreign statement,—warranted also "free from capture, seizure, and detention, and all the consequences thereof, or of any attempt thereat, and free from all consequences of hostilities, riots, or commotions," by the ship or vessel called the Linwood, lost or not lost, at and from Rio de Janeiro to New Orleans and [or] New York, calling at Belize for orders, including the risk of craft. Covenant, that the said insurance should commence upon the goods and merchandise on board the said ship from the loading of the said goods or merchandise on board the said vessel at as above and until the said goods or merchandise should be discharged or safely landed; and that it should be lawful for the said ship or vessel to proceed and sail to and touch and stay at any ports or places whatsoever in the course of her said voyage for all necessary purposes, without prejudice to the said insurance. And, touching the adventures and perils which the defendants were made liable to by the said insurance, they were declared to be of the seas, men of war, fire, enemies, pirates, rovers, thieves, jetti-

(*a*) At 50*s.* premium, the ordinary rate being 25*s.*

sons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality, soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come *to the hurt, detriment, or damage of the afore- [*261
said subject-matter of the said insurance, or any part thereof.
The count then averred that the coffee was placed on board the said ship, and that, while it was so on board, the said ship was stranded, and afterwards, and during the continuance of the said risk, the said goods were by divers of the perils insured against, and not by any of the excepted perils, totally lost.

Plea, that the said goods were not lost by any of the perils insured against by the said policy, and that the goods were lost by certain of the perils from which the same were by the policy warranted free.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term, when the facts proved or admitted were as follows:—The 6500 bags of coffee in question were on the 24th of May, 1861, shipped on board the Linwood at Rio de Janeiro for New York. She sailed on the 26th, and on the 1st of June arrived at Belize, whence she departed on the 3d for New York, calling at New Orleans. On the 17th of July, at 8 p. m., the captain, believing that he was about thirty-five miles to the eastward of Cape Hatteras, and the wind being South-South-West, changed his course from North-North-East to West, and turned in for the night, and in the course of a short time the ship ran aground about two hundred yards from the shore in Hatteras inlet, ten miles to the South-West of the Cape. There had for many years been a light at Cape Hatteras, which in ordinary weather was visible, according to the evidence of some of the witnesses, at a distance of twenty or twenty-five or even thirty miles. For some time prior to the time the Linwood sailed from Rio de Janeiro hostilities had subsisted between the Northern states of America and some of the Southern states which had seceded from the Union,—the two contending parties being respectively known as the "federals" *and the "confederates," and the latter, though not [*262
formally recognised by foreign nations as an independent con-
federation, being generally treated as entitled to all the rights of belligerents according to the law of nations.

The state of North Carolina being one of the confederate states, the light on Cape Hatteras had been extinguished by order of the confederate government, for the purpose of harassing the federal shipping. This was done some time prior to the 17th of July: but the fact was unknown to the captain of the Linwood until after his disaster. The Linwood was the property of federal owners; but the cargo belonged to British merchants.

On the morning of Wednesday, the 18th of July, the Linwood being aground, two confederate officers came on board, and told the captain they would take possession of the ship. They accordingly possessed themselves of the ship's papers, which with the captain they took on shore, where he was detained as a prisoner; on the afternoon of the following day the mate and crew were likewise taken on shore and detained. The weather being bad, no attempt was made to save any of the cargo until Thursday the 19th, when 150 bags (or 120, it

did not clearly appear which,) of coffee were landed by salvors (popularly called "wreckers"), persons employed by the (federal) government for that purpose. According to the evidence, these wreckers could on that day have landed 1000 bags more,(a) but the confederate troops would not allow them to do so, unless they would consent to save the goods for them. On the 19th the weather became very boisterous, and on the 20th the vessel broke up, and the whole of the coffee remaining on board was lost.

*263] *Upon these facts, a verdict was entered for the plaintiff as for a total loss, leave being reserved to the defendants to move to enter a nonsuit, or to reduce the damages, on the ground that the loss was occasioned by or in consequence of hostilities or capture or riots or commotion, against which loss the defendants were warranted free, or at least that a partial loss was by such excepted perils turned into a total loss,—the court to have power to draw such inferences as a jury might have drawn.

Brett, Q. C., on a former day in this term, obtained a rule nisi accordingly. He submitted that the immediate cause of the loss was the hostile seizure, and not the perils of the sea.

Bovill, Q. C., *Lush*, Q. C., and *Sir G. Honyman*, showed cause.—Assuming that the Hatteras light, if there, might have been seen in time to alter the ship's course,—although upon the evidence that is by no means clear,—the proximate cause of the loss here was a peril of the sea: the captain was, in consequence of the currents, or from some other cause, out of his reckoning. The absence of the light was only remotely a cause of the loss. From the moment the ship struck, she was in a position from which she could not by any human agency be released: she had then received her death-blow. The authorities as to what is causa proxima and what remota are well collected in Broom's Legal Maxims, 3d edit. 202 et seq. After adverting to Lord Bacon's paraphrase of the maxim "In jure non remota causa sed proxima spectatur,"—"It were infinite for the law to consider the causes of causes, and their impulsions one of another: therefore it contenteth itself with the immediate cause, and judgeth of acts by

*264] that, without looking to any further *degree,"—the learned author says: "It is a well-known and established rule, that, in order to entitle the assured to recover upon his policy, the loss must be a direct and not a remote consequence of the peril insured against; and that, if the proximate cause of the loss or injury sustained be not reducible to some one of the perils mentioned in the policy, the underwriter will not be liable. If, for instance, a merchant-vessel is taken in tow by a ship of war, and thus exposed to a tempestuous sea, the loss thence arising is properly ascribable to the perils of the sea,—Hagedorn *v.* Whitmore, 1 Stark. N. P. C. 157 (E. C. L. R. vol. 2). And, where a ship meets with sea damage, which checks her rate of sailing, so that she is taken by an enemy, from whom she would otherwise have escaped, the loss is to be ascribed to the capture, not to the sea-damage,—Green *v.* Elmslie, Peake's N. P. C. 212; Livie *v.* Janson, 12 East 648, 653; Hahn *v.* Corbett, 2 Bingh. 205 (E. C. L. R. vol. 9), 9 J. B. Moore 390. So, the underwriters are liable for a loss

(a) Whether this included the 120 or 150 bags before mentioned, was left doubtful upon the evidence.

arising immediately from a peril of the sea, or from fire, but remotely from the negligence of the master and mariners,—Walker *v.* Maitland, 5 B. & Ald. 171 (E. C. L. R. vol. 7); Busk *v.* The Royal Exchange Assurance Company, 2 B. & Ald. 73; per Bayley, J., Bishop *v.* Pentland, 7 B. & C. 219, 223 (E. C. L. R. vol. 14), 1 M. & R. 49; Phillips *v.* Nairne, 4 C. B. 343 (E. C. L. R. vol. 56); Hodgson *v.* Malcolm, 2 N. R. 336; Waters *v.* Louisville Insurance Company, 11 Peters (U. S.) R. 220. 222, 223; Columbine Insurance Company *v.* Lawrence, 10 Peters (U. S.) R. 517; The Patapsco Insurance Company *v.* Coulter, 3 Peters (U. S.) R. 222; General Mutual Insurance Company *v.* Sherwood, 14 Howard (U. S.) R. 351: and, where a ship, insured against the perils of the sea, was injured by the negligent loading of her cargo by the natives on the coast of Africa, and being pronounced unseaworthy was run ashore in order to prevent her from sinking, and to save the *cargo, the court held that the rule causa proxima non remota spectatur must be applied, and that [*265 the immediate cause of loss, viz., the stranding, was a peril of the sea,"—Redman *v.* Wilson, 14 M. & W. 476: and see Laurie *v.* Douglas, 15 M. & W. 746, and Corcoran *v.* Gurney, 1 Ellis & B. 456 (E. C. L. R. vol. 72). In Patrick *v.* The Commercial Insurance Company, 11 Johns. (U. S.) R. 14, the policy contained the following clause,—"the assurers took no risk in port but sea risk." It appeared that the ship was driven from her moorings, and stranded, within the port of Cadiz; and that, while she lay on dry land, and above high-water mark, she was forcibly taken possession of and burnt by the French troops. It further appeared that the cargo was not injured by the stranding, and that no effort was made to unload the ship after she was stranded: it was held that the loss of the cargo must be attributed to the act of the French, which was a peril not insured against, and not to the stranding of the vessel, which was within the words of the policy; that, although the stranding of the vessel led to her subsequent destruction by the enemy, yet the latter was the immediate cause of the loss, according to the maxim above referred to. So, in Powell *v.* Gudgeon, 5 M. & Selw. 431, where the ship, being delayed by the perils of the sea from pursuing her voyage, was obliged to put into port to repair, and, in order to defray the expenses of such repairs, the master, having no other means of raising money, sold part of the goods, and applied the proceeds in payment of these expenses,—the court held that the underwriter was not answerable for this loss, for that the damage was to be considered as not arising *immediately* from, although in a remote sense it might be said to have been brought about by, a peril of the sea. Lord Ellenborough says: "The injury to the assured was caused by the sale of their goods; but no *one will contend that the sale was an immediate con- [*266 sequence of a peril of the sea. The peril of the sea damaging the ship rendered it innavigable; to restore its navigability, a refitment became necessary. The captain, who was interested in and bound to have the ship in a navigable state, being unable to raise the means of refitting her, was obliged to apply to the owners of the goods for a loan, through the medium of a sale of part of the goods. It was therefore a sort of forced loan which was the proximate cause of loss to the owners from the sale of their goods. This was indeed

connected with a peril of the sea, because a peril of the sea occasioned damage to the ship, which made repairs necessary, and funds to provide these repairs: but it was the want of funds aliundè which obliged the captain to have recourse to a sale of the goods." Here, though the absence of the light might have remotely conduced to it, the peril of the sea,—the captain's mistake in his reckoning,—was the immediate cause of the vessel's going on shore. In Marshall on Insurance, 4th edit. by Shee, Serjt., p. 374, it is said: "Every loss must be ascribed to its immediate, and not to any remote cause. Therefore, if a ship be driven by stress of weather on an enemy's coast, but not materially damaged, and she be there captured, this is not a loss by the perils of the sea, but by *capture;* and the insured may recover upon a policy against capture only: per Lord Kenyon, Green *v.* Elmslie, Peake N. P. C. 212. And where in such case the insured was precluded by a special warranty from recovering the loss by capture, neither could he recover for any antecedent damage occasioned by the perils of the sea, which the total loss rendered immaterial, though he would have been entitled to the amount of disbursements actually made in consequence of such damage: Livie *v.* Janson, 12 East 648. So, *267] *where the profits of an entire cargo 'loaden or to be loaden on board' were insured, and the ship was lost with only part of the cargo on board, and the expectation of profit on the part not shipped was frustrated by the delay in carrying it to its destination; this latter was held not to be a loss by the perils of the sea: M'Swiney *v.* The Royal Exchange Assurance Company, 14 Q. B. 634, 646 (E. C. L. R. vol. 68). And where a ship, being disabled by perils of the sea, put into port to repair, and the master was obliged to sell part of the goods to defray the expenses,—this was held not to be a loss by the perils of the sea, though they were the remote cause of it, the *proximate* cause being the want of funds to pay for the repairs: Powell *v.* Gudgeon, 5 M. & Selw. 431; Sarquy *v.* Hobson, 4 Bingh. 131 (E. C. L. R. vol. 13), 12 J. B. Moore 474. Where the master of a slave-ship, having mistaken his course, prolonged the voyage, whereby a scarcity of water ensued, and a number of slaves were thrown overboard to save the rest, it was held not sufficient, in declaring for this loss, to state that by contrary winds and currents, and the perils of the sea, the ship was retarded, and the slaves perished for want of water; for, the underwriters are entitled to have the loss stated according to the truth, and so as to enable them to dispute their legal liability: Gregson *v.* Gilbert. So, where a number of slaves perished for want of sufficient food, and the failure of food was occasioned by extraordinary delay in the voyage, arising from bad and stormy weather,—this was holden to be a loss by natural death, and not by the perils of the sea: Tatham *v.* Hodgson, 6 T. R. 656. But the death of animals, occasioned by the labouring of the ship, and the kicking and struggling to which it gave rise, has been held a loss for which underwriters are responsible, upon a policy containing a warranty 'free of mortality:' Lawrence *v.* Aberdein, 5 B. & Ald. 107 (E. C. L. R. vol. 7); *Gabay *v.* Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641. Underwriters have been held liable for losses which, although caused by the immediate and direct agency of perils insured against, could not have taken place without negli-
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gence on the part,—of the mate, in not extinguishing a fire in the cabin (Busk *v.* The Royal Exchange Assurance Company, 2 B. & Ald. 73); of the crew in conveying goods from the ship to the shore (Walker *v.* Maitland, 5 B. & Ald. 171 (E. C. L. R. vol. 7);) of the mate, in using a rope of insufficient strength to lash a vessel to a harbour pier (Bishop *v.* Pentland, 7 B. & C. 219, 1 M. & R. 49); of the captain, in sailing homeward in a ship originally seaworthy, in a state of dangerous leakiness (Holdsworth *v.* Wise, 7 B. & C. 219 (E. C. L. R. vol. 14), 1 M. & R. 673; Shore *v.* Bentall, 7 B. & C. 798, n.); of the captain, in heaving over too much of the ship's ballast (Dixon *v.* Sadler, 5 M. & W. 405); of stowers, in improperly loading a vessel on her return voyage, which had been seaworthy at the commencement of the risk insured (Redman *v.* Wilson, 14 M. & W. 476). In these cases the proximate causes of loss were perils insured against. But, where the loss is immediately referable to the negligence or misconduct of the assured, or of his servants or agents, the underwriters are not responsible: Dawson *v.* Atty, 7 East 367; Bell *v.* Carstairs, 14 East 374; Siordet *v.* Hall, 4 Bingh. 607 (E. C. L. R. vol. 13), 1 M. & P. 561; Tanner *v.* Bennett, R. & M. 182; Bradford *v.* Levy, 2 C. & P. 137 (E. C. L. R. vol. 12)." In Tatham *v.* Hodgson, 6 T. R. 656, upon an insurance on slaves against perils of the sea, it was held that their death by failure of sufficient and suitable provisions, occasioned by extraordinary delay in the voyage from bad weather, was not a loss within the policy, but a loss by natural death, which since the 30 G. 3, c. 33, s. 8, and 34 G. 3, c. 80, s. 10, cannot be insured against.(*a*) *Underwriters are liable for a loss arising immediately from a peril of the sea, but remotely from the negligence of the master and mariners: Walker *v.* Maitland, 5 B. & Ald. 171 (E. C. L. R. vol. 7). In Bishop *v.* Pentland, 7 B. & C. 219 (E. C. L. R. vol. 14), 1 M. & R. 49, the vessel, having in the course of her voyage been compelled to put into a tide-harbour, was there moored alongside the quay in the usual place for ships of her burthen; but, in consequence of the insufficiency of the rope by which she was fastened in order to prevent her falling over when the tide receded, she was stranded: and Bayley, J., said,—"The cases of Busk *v.* The Royal Exchange Assurance Company, 2 B. & Ald. 73, and Walker *v.* Maitland, 5 B. & Ald. 171 (E. C. L. R. vol. 7), establish as a principle that the underwriters are liable for a loss the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners. Assuming, therefore, that those who had the care of the ship were guilty of negligence in not providing a rope of sufficient strength to fasten the vessel to the shore, and that their negligence was the remote cause of the loss, still, if the proximate cause was a peril insured against, the plaintiffs are entitled to recover." Parke, B., referring to these cases, in Redman *v.* Wilson, 14 M. & W. 483, says: "We cannot distinguish between the negligence of the master and mariners and the negligence of the natives (if they were negligent, and remotely gave occasion to the loss), who were employed to put the cargo on board." In Hahn *v.* Corbett, 2 Bingh. 205 (E. C. L. R. vol. 9), 9 J. B. Moore 390, the insurance was on goods in a ship warranted free from capture and seizure. The [*269

(*a*) See Lawrence *v.* Aberdein, 5 B. & Ald. 107 (E. C. L. R. vol. 7).

ship was stranded on a shoal within a few miles of the port of destination, disabled from proceeding and lost: but, while she lay in the sand, she was seized by the commander of the place at which she was stranded, and the goods were confiscated by him: and this was held
*270] to be a *loss of the goods by the perils of the seas. Best, C. J., in delivering judgment, says: "The ship is totally lost; and, though the goods are afterwards recovered in a damaged state, they fall into the hands of an enemy, and, but for that circumstance, would also have been totally lost. It has been asked *when* the goods can be said to have been lost. When the ship was totally lost. There is no statement that any other ship was at hand, or that any land was near. If the underwriters were exempted from liability on capture by an enemy, they were not entitled to calculate on preservation of the goods by an enemy: but, if the enemy had not come, it is clear the goods would never have been moved, because the ship never moved. It was just as if they had been cast on a rock and had been completely out of reach. The goods, therefore, were lost when the ship was lost; and what happened afterwards makes no difference in the case." That is a very important authority, and directly in point. [BYLES, J.—Except that the Chief Justice assumes throughout that the cargo must have been lost: whereas, here it is proved, that, if not prevented by persons assuming a hostile position, the wreckers or salvors might have saved 1000 bags of the coffee.] If the natural consequence of the vessel's running on shore was the loss of the cargo, if no one comes to save it, that is a loss by perils of the sea. It is not the less a loss by perils of the sea because of the omission of any attempt, from whatever cause, to save the cargo. In Hadkinson *v.* Robinson, 3 Bos. & P. 388, it was held, that, if a cargo of a perishable nature be insured from A. to B., with the usual memorandum, and in the course of the voyage information be received by the master that the port of B. is shut against ships of his nation, in consequence of which the commander of the convoy orders the ship to proceed to another port, and the
*271] cargo *be there sold by order of the Vice-Admiralty Court for a very small sum, the assured cannot abandon as for a total loss. There, the loss did not arise from a peril insured against. In Bondrett *v.* Hentigg, Holt, N. P. C. 149 (E. C. L. R. vol. 3), where, on a policy on goods, the vessel was wrecked, and part of the goods were lost, and part got on shore, but (whilst on shore) were destroyed and plundered by the inhabitants of the coast, so that no portion of them came again into the possession of the assured,—it was held that this was a loss by the perils of the sea. In Knight *v.* Faith, 15 Q. B. 649 (E. C. L. R. vol. 69), a ship insured for 1000*l.* for a year ending 23d of September, was stranded, got off, and brought into the harbour of Santa Cruz, on the 16th of September. She remained there with her crew on board till the middle of October, and during that time was pumped from time to time, and her cargo was discharged into other vessels. Being then beached and surveyed, she was found to have been so much damaged by the accident that the necessary repairs could not be done at Santa Cruz, there being neither dockyard, workmen, nor materials there; nor could she be taken to any port where she could prudently have been repaired. Afterwards (in October), the master, who was a part owner, and interested in the policy, sold the ship for the benefit

of those whom it might concern; and she fetched 72*l.* No notice of abandonment was given. In an action against the underwriters, a special case set forth these facts, and also stated that the vessel "received her death-blow" by the said perils of the seas on the 16th of September, but that the damage was not ascertained till the 24th. It was held that the assured were entitled to recover for a partial loss by the stranding before the 23d of September, though the loss was not ascertained till after that day,—the proximate cause of the loss, viz., the injury by stranding, having taken place during the [*272
*year covered by the insurance; and that the ultimate loss did not prevent such recovery. Lord Campbell, in delivering the judgment of the court, there says: "We very much doubt whether any such doctrine ever was laid down by Lord Mansfield in Meretony *v.* Dunlope;(*a*) and the decision of the court may have proceeded on a totally different ground. The doctrine seems contrary to the principle of insurance law, that the insurer is liable for a loss actually sustained from a peril insured against during the continuance of the risk: and, if a ship, insured for time, during the time receives damage from the perils of the sea, although the amount of it be not ascertained till the expiration of that time, and she is kept afloat till then, upon the assured taking proper steps, by giving notice of abandonment, or by obtaining evidence of the sum which would be required to repair the damage sustained, there does not appear any good reason why they may not, according to the facts, proceed against the insurers for a total loss or for a partial loss." In Montoya *v.* The London Assurance Company, 6 Exch. 451, a vessel laden with hides and tobacco in the course of her voyage shipped large quantities of sea-water. On the termination of the voyage, it was discovered that the sea-water had rendered the hides putrid, and that the putrefaction of the hides had imparted an ill flavour to the tobacco, and had thereby injured it: and it was held that the damage thus occasioned to the tobacco was a loss by perils of the seas. In Palmer *v.* Naylor, 10 Exch. 382, to a declaration on a policy of assurance on *advances for the transport [*273
of Chinese emigrants from China to Peru, for their outfit and provisions, to be paid on the arrival of the emigrants at the port of destination, the perils insured against being "pirates, rovers, thieves, &c., barratry of the master and mariners, and all other perils, losses, and misfortunes," &c., in the usual form; the declaration alleging a total loss by the emigrants piratically and feloniously murdering the captain and part of the crew, and feloniously stealing and carrying away the ship,—the defendants pleaded,—first, that, as soon as the emigrants had committed the murder and obtained possession of the ship, they steered for the nearest land for the purpose of being landed, and refused to and would not proceed upon the voyage, and the vessel was then fit and able safely to proceed to the said port, and the remainder of her crew could have navigated her there, and were ready and willing to convey the emigrants there if they would have gone, but that they would not, and that, by reason of such refusal, and for no

(*a*) Easter, 23 G. 3, cited 1 T. R. 360. That was an insurance on a ship for six months; and three days before the expiration of the time she received her death-wound, but, by pumping, was kept afloat till three days after the time: there the verdict was given for the insurer, which was confirmed by the court.

other cause whatsoever, the transport was never completed,—secondly, as to the taking and carrying away of the vessel, that the emigrants were unwilling to be carried on the said voyage, and that they committed the murder and took possession of the vessel for the purpose of being landed and of escaping and from being carried on the voyage, and for no other purpose, which was the said piratical carrying away of the vessel. It was held by the Exchequer Chamber, affirming the judgment of the court below (see Naylor *v.* Palmer, 8 Exch. 739), that the murder of the captain and of part of the crew, and the seizure of the vessel by the emigrants, as alleged in the declaration and admitted by the pleas, was, if not a piratical act, one ejusdem generis, and therefore within the perils insured against: and that, as the loss was complete at that moment, and was never reduced, *the unwil- *274] lingness of the emigrants to proceed was not the cause of the loss, but was wholly immaterial; and consequently that the pleas were bad.(*a*) And see Thompson *v.* Hopper, E. B. & E. 1038 (E. C. L. R. vol. 96. Even with this extensive warranty, the risk of the underwriter is greatly enhanced by the existence of hostilities. For instance, from the increased demand for pilots on the coast of the belligerent country, and the increased number of ships in neutral ports, and from the fact of buoys which formerly marked the channel of a port being removed. This accounts for the increased premium paid here.

There was no capture of the ship here, or any attempt at capture: the struggle between the confederate troops and the salvors was, as to who should get the salvage. When the recent war first broke out between Russia and Turkey, at the massacre of Sinope shots aimed by the one squadron at the other struck and injured neutral merchantmen to whom no act of hostility was intended: and it was held that underwriters upon policies warranted "free from capture, seizure, and detention," were liable.(*b*) In consequence of those decisions, the words "free from all consequences of hostilities, riots, or commotions," were introduced. The word "consequences" is a compendious description of the perils to be excepted, and not a description relating to the loss. Instead of saying what particular results are to be excepted, the word "consequences" is introduced to denote the class of perils which may result from hostilities. In the cases above adverted to, the injury was in a certain sense a consequence of hostilities. Suppose this vessel had been fired at and sunk by a confederate ship or battery, that no doubt *would have been a loss arising from *275] or consequent upon hostilities. Or, suppose she found herself between a federal gunboat and a confederate, and, receiving a fire not intended for her, she was struck and sunk, there the loss would be ascribable to a consequence of hostilities. But suppose, in order to avoid a torpedo which the captain knew was lying in his proper course, he deviated, and so came upon a rock, and was lost: can anybody doubt that that would be a loss by a peril of the sea? You cannot inquire what caused the existence of the peril. It is not the causa sine qua non, but causa proxima, which the law regards. Suppose the vessel, wanting an anchor, had gone into Charleston to get

(*a*) See Kleinwort *v.* Shepard, 1 Ellis & Ellis 447 (E. C. L. R. vol. 102).
(*b*) See Powell *v.* Hyde, 5 Ellis & B. 607 (E. C. L. R. vol. 85).

one, and in consequence of the existing hostilities she was unable to do so, and for want of an anchor was afterwards lost, could it be said that that was a loss the consequence of hostilities? Or, suppose half her crew having died, she put into Charleston to obtain others, but, from the state of affairs at this time there, she was obliged to proceed on her voyage short-handed, and a storm arose, and she was lost,—would that be a loss the consequence of hostilities? [KEATING, J.—Suppose the vessel were lost through missing the proper channel in consequence of the removal of a buoy, for hostile purposes?] That would be like the actual circumstances,—the extinguishment of the light. [ERLE, C. J.—Suppose the buoy shifted for the purpose of causing hostile ships to get into danger, would the loss under such circumstances be a loss arising from the consequences of hostilities?] Clearly not. We must look only to the *immediate* cause of the loss: and the proximate cause of loss there would be the striking the rock, a peril of the sea, not the being decoyed into danger. Then, do the words "riots or commotions" mean anything as distinguished from "hostilities?" A nation may be at *hostility with another [*276 nation, without there existing any commotion or riot within its own territories.(a) "Commotion" is ordinarily defined to be "a tumult of people, a disturbance;" and "Riot" is "a tumultuous disturbance of the peace by three or more persons mutually aiding and assisting each other." There was no evidence that there was anything of that sort at Hatteras inlet when this vessel went ashore there. [ERLE, C. J.—Would a seizure of the goods by a tumultuous and ungovernable mob be within these words?] No doubt it would. What are the facts here? The vessel was on her way from Belize to New York. Her proper course until she approached Cape Hatteras, the most prominent point of the coast, was North-North-East; then, having cleared the cape, due North. Long, however, before she reached Cape Hatteras, being out of his reckoning, and ten miles to the south of the Cape, the captain changed his course, and steered directly for the coast. Possibly the captain might have veered off in time to avoid the disaster if the light had been there; and it may be conceded that the absence of the light was the consequence of an act of hostility towards the federal party. But it was not the absence of the light, but a peril of the sea, which was the proximate cause of the loss. The ship became a wreck the moment she struck, there being no possibility of getting her off: and the loss of the cargo followed as a natural consequence upon the loss of the ship. It is not pretended that anything could have been saved beyond the 150 bags carried on shore and the 1000 bags which the salvors possibly might have saved but for the contest between them and the confederate officers as to the interest in the salvage.

Brett, Q. C., *Mellish*, Q. C. and *Maclachlan*, in support of the [*277 rule.—Taking the cases of Livie *v.* Janson, 12 East 648, Green *v.* Elmslie, Peake's N. P. C. 212, and Hahn *v.* Corbett, 2 Bingh. 205, 9 J. B. Moore 390, together, there will not be much difficulty in coming to a right conclusion in this case. If there was a total loss by perils of the sea before the total loss by capture, the latter will not help the

(a) As to the civil commotion, see Langdale *v.* Mason, Park Ins. 657 Marsh. Ins. 689; Selw. N. P., 12th edit. 1045.

underwriters: but, if there was only a partial loss by perils of the sea before the loss by capture, the latter is a complete answer to the claim of the assured upon this policy. Two questions therefore arise,—first, whether there was a total loss in consequence of hostilities,—secondly, when did the total loss occur. The policy is to be construed, like any other contract, according to the intention of the parties as expressed in the instrument, and as it is to be gathered from the surrounding circumstances, and as if the words of exception had been found in a policy effected for the purpose of covering the very risks excepted out of this policy: and effect must, if possible, be given to every word. Knowing the difficulties which had arisen in the cases which occurred during the Russian war, and that hostilities existed between the Northern and Southern States of America, the clause in question was framed expressly to guard the underwriters from being held responsible for a loss arising from that state of things. Had the policy in the Sinope case contained the words which are found here,—"free from all consequences of hostilities,"—the result would have been different; the sinking of the ship by the Russian fire would clearly have been a "consequence of hostilities" within the exception. In insurance law, "cause" is understood to mean a material cause competent to the effect produced. The word "consequence," to which the argument on the part of the plaintiff attributes little or no
*278] *meaning, is by no means correlative with "cause." In Crabb's English Synonymes, it is said that "a *consequence* is that which follows of itself, without any qualification or restriction; an *effect* is that which is effected or produced, or which follows from the connection between the thing effecting, as a cause, and the thing effected. In the nature of things, causes will have *effects*, and for every *effect* there will be a *cause*, although it may not be visible. *Consequences*, on the other hand, are either casual or natural; they are not always to be calculated upon. *Effect* applies to physical or moral objects; *consequences* to moral objects only: diseases are the *effects* of intemperance; the loss of character is the general *consequence* of an irregular life. *Consequences* follow either from the actions of men, or from things where there is no direct agency or design; *results* follow from the actions or efforts of men: *consequences* are good or bad; *results* are favourable or unfavourable. We endeavour to avert *consequences* and to produce *results*." The parties having chosen a word for the purpose of defining the rights on the one side and the liability on the other, the court must, in construing the instrument, accept it in all its breadth according to the common understanding of mankind. It is matter of common knowledge that the underwriter is familiar with the usual course of the voyage he undertakes to insure. The voyage in question was from Rio de Janeiro to New Orleans, and thence round the coast of Florida to New York. From Florida the course was North-North-East to Cape Hatteras, which is well known to be one of the most dangerous headlands in the Atlantic Ocean, and thence due North to New York. All persons navigating that coast trusted to the light on Cape Hatteras, which was visible at the distance of from
*279] twenty to thirty miles. Being out of *his reckoning, and assuming the light to exist, the captain proceeds, and suddenly finds his ship aground about two hundred yards from the shore. It

cannot be denied that the vessel and cargo were destroyed by a peril of the sea, and that, if there had been no such warranty as is contained in this policy, the underwriters would have been liable. But it is equally clear, that, but for the extinguishment of the light, which was an act done in furtherance of hostilities between the contending parties, the danger never would have arisen. The loss, therefore, was a consequence of hostilities,—a direct and immediate consequence of the hostile extinguishment of the light. Suppose a legal duty is cast upon some one to maintain a light, and in consequence of the neglect of that duty a ship gets ashore and is lost,—could it be said that the cause of the damage was too remote to enable the owner to recover against the party guilty of the neglect? Lord Campbell's exposition of the law in Thompson *v.* Hopper, 6 Ellis & B. 937 (E. C. L. R. vol. 88), has never been overruled. He there says: "The legal maxim relied upon (In jure non remota causa sed proxima spectatur) is very much to be respected; and it has been very properly applied to various points of insurance law when consideration is had of particular perils for which assurers undertake to be liable, and particular perils from which they are exempted, and where questions have arisen whether the loss is proved to have occurred in the manner alleged in the declaration, as in the cases of Livie *v.* Janson, 12 East 648, Busk *v.* The Royal Exchange Assurance Company, 2 B. & Ald. 73, Walker *v.* Maitland, 5 B. & Ald. 171 (E. C. L. R. vol. 7), Bishop *v.* Pentland, 7 B. & C. 219 (E. C. L. R. vol. 14), 1 M. & R. 49, Dixon *v.* Sadler, 5 M. & W. 405 (affirmed in Exchequer Chamber, Sadler *v.* Dixon, 8 M. & W. 895), Redman *v.* Wilson, 14 M. & W. 476, and Heyman *v.* Parish, 2 Campb. 149. But, even here, *the maxim is not to be [*280 applied if it would contravene the principles of insurance law and the manifest intention of the parties." In none of the cases cited on the other side was there any warranty at all approaching this. In Hogedorn *v.* Whitmore, 1 Stark. N. P. C. 157 (E. C. L. R. vol. 2), the loss was clearly a loss by perils of the sea. In Green *v.* Elmslie, Peake's N. P. C. 212, the loss was by capture; but there was no warranty against capture. In Patrick *v.* The Commercial Insurance Company, 11 Johns. (U. S.) R. 14, the cargo was not damaged by the stranding: the only loss was by the ship being taken and burnt by the enemy. In Lawrence *v.* Aberdein, 5 B. & Ald. 107 (E. C. L. R. vol. 7), where the insurance was on mules, asses, and oxen, the words of warranty were, "free of mortality and jettison." In the course of the voyage, some of the animals, in consequence of the agitation of the ship in a storm, were killed, and others from the same cause received such injury that they died before the termination of the voyage insured: and it was held that this was a loss by a peril of the sea, for which the underwriters were liable. But Abbott, C. J., in the course of his judgment, observes,—"If the ship in this case had been driven out of her course by the perils of the sea, and the voyage thereby had become so protracted as to exhaust all the provisions, and, consequently, the means of sustaining the life of the animals insured, I think that the words 'warranted free from mortality,' introduced into this policy, would have protected the underwriters from that loss for which they otherwise would have been liable as for a loss arising from the perils of the sea." The case upon which the main reliance is

placed on the other side is that of Hahn *v.* Corbett, 2 Bingh. 205 (E. C. L. R. vol. 9), 9 J. B. Moore 390, which is always met by Green *v.* Elmslie, Peake's N. P. C. 212. The judgment in Hahn *v.* Corbett
*281] was founded upon an inference of fact from the statements *in the special case, and therefore can have little or no influence upon a case involving a different state of circumstances. The ship there drifted on the sand about eight or nine miles from Fort San Carlos, on the coast of Maracaybo: the captain applied to the fort for assistance to save the ship and cargo, but found himself in the hands of enemies: the proximate cause of the loss was the peril of the sea. [WILLES, J.—You contend that the warranty here is an exception of certain losses by perils of the sea, whether immediate or remote.] Yes: it is an exception out of the policy of certain losses by sea perils which are the fair consequence or result of acts of hostility. [WILLES, J.—Suppose the vessel had deviated from her course for the purpose of avoiding capture by a confederate cruiser, the Alabama, for instance, and in consequence of that deviation was lost by a peril of the sea, would that be a loss from a consequence of hostilities?] In that case it would seem that the loss would be a loss proximately by perils of the sea.

When did a total loss by perils of the sea take place? As long as the goods remain in specie in the possession or under the control of the master and mariners and capable of being saved, there is no total loss. Assuming that the ship the moment she touched the ground became hopelessly lost, still the great bulk of the cargo remained in an undamaged state, and might have been saved. But for the interference of the confederate troops, the evidence shows that at least 1000 bags of the coffee might and would have been got ashore. [BYLES, J.—You contend that the partial loss from the stranding became a total loss by the act of the confederate troops?] Yes. It became a total loss in consequence of one of the excepted perils. The vessel having been brought to her destruction by means of the act of
*282] hostility in extinguishing the *light, there was a capture of the cargo the moment it was taken out of the possession and control of the captain and crew. To constitute a capture, it is not necessary that any one should be put on board by the captors: The Edward and Mary, 3 C. Rob. Adm. Cas. 305; The Hercules, 2 Dodson's Adm. R. 353. Hahn *v.* Corbett, 2 Bing. 205 (E. C. L. R. vol. 9), 9 J. B. Moore 390, is relied on by the other side to show that there was a total loss of the coffee before the master was deprived of the control over it. But there the case finds as a fact, and it is a fact that is mainly relied on in the judgment, that the ship and cargo were totally lost before the capture. Burrough, J., there says:—"There is a material distinction in the facts of Livie *v.* Janson which it is requisite to attend to, because qui benè distinguit benè docet. In the present case, the injury was occasioned by the waves and the shoal: in Livie *v.* Janson, the ship was not hurt by the wind, and the loss was virtually occasioned by her breaking the embargo. Upon the principle, therefore, that the proximate cause of loss must be looked to, and considering that in the present case the perils of the sea were that proximate cause, our judgment must be for the plaintiff." The average loss which took place before by the perils of the sea is merged

in the subsequent loss by capture. Lord Ellenborough, in giving judgment in Livie *v.* Janson, 12 East 653, says:—"It is to be recollected that nothing is properly imputable to the sea-damage but the deterioration of the ship and cargo; for, though such sea-damage might stop the progress of the voyage, and so bring the ship and cargo within the reach and effect of some other distinct peril which they might otherwise have escaped, yet the substantive loss by that latter peril is imputable to such latter peril only, not to the previous sea-damage. If, for instance, a ship meet with sea-damage, which checks her rate of *sailing so that she is taken by an enemy from whom she would otherwise have escaped; though she would have arrived safe but for the sea-damage, the loss is to be ascribed to the capture, not to the sea-damage; and this upon the principle that causa proxima non remota spectatur. The case of Green *v.* Elmslie, Peake's N. P. C. 212, proceeds upon a similar principle: there the ship would not have been captured, had she not been driven by stress of weather upon the enemy's coast; and yet the loss was held imputable to the capture, and not to the perils of the seas, which had driven the vessel within the influence of the peril of capture. Considering the deterioration of the ship and cargo, then, as the extent of what is referable to the head of sea-damage, we think we may lay it down as a rule, that, where the property deteriorated is afterwards totally lost to the assured, and the previous deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it the ground of a claim upon the underwriters. The object of a policy is, indemnity to the assured; and he can have no claim to indemnity where there is *ultimately no damage* to him from any peril insured against. If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him, had the property been ever so entire, how can he be said to have been injured by its having been antecedently damaged?" [WILLES, J.—Was the question of total or partial loss material in Hahn *v.* Corbett, leaving Livie *v.* Janson (which is open to observation) out of the question?]—No. Here, there was clearly a loss by capture or by a consequence of hostilities prior to the total loss by the perils of the sea, which latter only took place when the ship broke up. [*283

*ERLE, C. J.—We are much indebted to the counsel on both sides for a very able argument. The conclusion I have come to after an attentive consideration is, that the plaintiff is entitled to recover in respect of a loss of a part of the subject of insurance. The policy was for 3000*l.* upon 6500 bags of coffee, valued at 25,000*l.*; and it contained an exception in the following words,—"warranted free from capture, seizure, and detention, and all the consequences thereof or of any attempt thereat, and free from all consequences of hostilities, riots, or commotions." The insured ship, with the coffee on board, on her voyage from Belize to New York, had to pass Cape Hatteras. The captain, intending to shape his course North-North-East until he had rounded the Cape, and then to steer due North, being out of his reckoning, and conceiving that he had passed the Cape, when he was in fact about thirty miles south and ten miles west of it, ran the ship on shore at Hatteras Inlet, where she was eventually [*284

lost. If these had been the only facts, it would have been a clear case of loss by perils of the sea. But it appears that, at Cape Hatteras, until the secession of the Southern States of America, there had always been a light maintained; and that the light had been extinguished, for hostile purposes, by the confederate or Southern party, who were at this time in possession of North Carolina. It may be taken as a fact for the purpose of the present judgment, that, if the light had still been there, the captain would have seen it, and might have put about in time and saved the ship.

The great contention on the first part of the case, was, whether the loss so brought about was a loss by the "consequence of hostilities" within the meaning of the policy. The extinguishment of the light was undoubtedly an act of hostility on the part of the confederates towards the federals. But, was the loss the *consequence of
*285] hostilities? I agree with the learned counsel that the question is entirely one of construction, and that the intention of the parties is to be gathered from the contract itself, taking it with the surrounding circumstances. The words are not so usual as to have been the subject of discussion on any former occasion, and consequently we have little light to shape our course by. It is our duty therefore, to exercise our best judgment, and to put such a construction upon the language of the instrument as we think must have been intended by the parties to it. I agree with the learned counsel who suggested that the words of the exception in this policy are to be construed as they would be if the assured had re-assured his cargo against the perils which are excepted by the warranty now in question; so that, to make the policy attach, the court must in that case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim causa proxima non remota spectatur is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now, the relation of cause and effect is matter which cannot always be actually ascertained: but, if in the ordinary course of events a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established. Was the putting out the light at Cape Hatteras so immediately connected with the loss of this ship as to make the one the consequence of the other? Can it be said that the absence of the light would have been followed by the loss of the ship, if the captain had not been out of his reckoning? It seems to me that these two events are too distantly connected with each other to stand in the relation of cause and effect. I will put an instance of what I conceive to be a "consequence of hostilities" *within
*286] the meaning of this policy. Suppose there was a hostile attempt to seize the ship, and the master in seeking to escape capture ran ashore and the ship was lost: there the loss would be a loss by the consequences of hostilities within the terms of this exception. Or, suppose the ship chased by a cruiser, and, to avoid seizure, she gets into a bay where there is neither harbour nor anchorage, and in consequence of her inability to get out she is driven on shore by the wind and lost; that again would be a loss resulting from an attempt at capture, and would be within the exception. But I will suppose a

third case,—the ship chased into a bay where she is unable to anchor or to make any harbour, and getting out again on a change of wind, but in pursuing her voyage encountering a storm which but for the delay she would have escaped, and being overwhelmed and lost: there, although it may be said that the loss never would have occurred but for the hostile attempt at seizure, and that the consequence of the attempt at seizure was the cause without which the loss would not have happened, yet the *proximate* cause of loss would be the perils of the sea, and not the attempt at seizure. Take another instance. The warranty extends to loss from all the consequences of hostilities. Assume that the vessel is about to enter a port having two channels, in one of which torpedoes are sunk in order to protect the port from hostile aggression, and the master of the vessel in ignorance of the fact enters this channel, and his ship is blown up: in that case the proximate cause of the loss would clearly be the consequences of hostilities, and so within the exception. But, suppose the master, being aware of the danger presented in the one channel, and in order to avoid it, attempts to make the port by the other, and by unskilful navigation runs aground and is lost,—in my opinion that *would not be a loss within the exception, not being a loss proximately connected with the consequences of hostilities, but a loss by a peril of the sea, and covered by the policy. [*287

Applying these principles to the facts of the present case, I am of opinion, that, the captain having missed his reckoning, and either not keeping a sufficient lookout, or not lying to when his position was doubtful, and so running on shore, it cannot be said that the absence of the light was proximately the cause of the loss; but that the loss was not within the exception contained in the warranty, but was within the general terms of the policy; and that, as the wreck of the ship brought about the loss of the cargo, the insurers are liable.

The ship ran aground on the night of Tuesday the 17th of July. On the Wednesday, the weather being boisterous, nothing could be done; but on the following day it moderated, and a great part of the cargo might have been saved. One hundred and fifty bags of coffee were landed, and according to the evidence 1000 more might have been saved but for the interference of the hostile troops of the confederate party, who prevented the salvors (officers of the federal government whose duty it was to act in such cases) from performing that duty, and compelled them to desist.

I am of opinion, that, when a ship is wrecked, and there is no appearance of the possibility of saving any part of the cargo, there is presumably a total loss of the cargo: but, when it is found that a part of the cargo might be saved, the presumption of a total loss ceases. And, it being proved here that 1000 bags of the coffee might have been saved but for the circumstances before adverted to, those 1000 bags must be taken to have been potentially saved. The saving of them having been prevented by an act of hostility, *those 1000 bags are brought within the exception in the policy, and the underwriters are not liable in respect of them. The result will be, that, in my judgment, the defendants are liable in respect of the 5350 bags which remained in the ship, but not for the 150 bags which were saved, or the 1000 bags which but for the hostile inter- [*288

vention of the confederates would have been saved; and consequently there is a partial loss within the meaning of this policy.

It has been contended by the learned counsel for the defendants that there was a total loss of the cargo by capture, within the warranty, and consequently that the underwriters are not liable at all. But it appears to me that none of the authorities relied upon in support of that proposition apply to the circumstances of this case. The ship with the cargo on board was in a state of wreck. The acts of the confederate troops were not dictated by the desire to make a capture in the ordinary sense, but by the mere desire to collect spoil for themselves. The case therefore stands in that respect upon a totally different footing from any of those which have been referred to.

Upon the whole, therefore, I am of opinion that the verdict should be entered for the plaintiff for the value of the 5350 bags (or whatever may be the proper number) the loss of which, for the reasons above stated, falls within the policy.

WILLES, J.—I am entirely of the same opinion upon all the points. There are three matters with reference to which this case is to be considered,—first, with reference to the absence of the accustomed light at Cape Hatteras,—secondly, with reference to the wreck of the ship and its immediate effects,—thirdly, with reference to the seizure by hostile troops.

*289] *1. So far as the absence of the light is concerned, the question to be considered, is, whether, by reason of the possibility, or the strong probability, as was put by Mr. Maclachlan in his very able argument, of the vessel escaping shipwreck if the light had been exhibited as usual, the loss is to be attributed to the hostile act of putting out the light. It appears to me that it is not. It may or may not have been the cause of the vessel being destroyed: but it was not the proximate and absolute certain cause of the loss. The proximate and absolute cause of the loss was the vessel being out of her course and getting on the rocks at Hatteras inlet. As soon as that is stated the only question which remains, I apprehend, is, whether we are to apply to this case the ordinary rule of insurance law, that, in ascertaining the relative rights of the parties, you are not to trouble yourself with distant causes, or to go into a metaphysical distinction between causes efficient and material and causes final; but you are to look exclusively to the proximate and immediate cause of the loss. It has been argued that the ordinary rules of insurance law are not applicable to this policy, by reason of the words of the warranty "all consequences of hostilities." For the purpose of this argument, I take it to be enough to deal with hostilities,—assuming the acts of the persons called confederates to be the acts of persons standing in a hostile position. I apprehend it is a fallacy to say that a larger sense is to be given to this exception by reason of the use of the word "consequences" than if the word used had been "effects." In construing the exception, we can only look to the proximate consequences of hostilities. The introduction of the word "all" really makes no difference; for, no rule of grammar is more universally applicable than this, that

*290] words general and words universal are all one. The *words "all consequences of hostilities" refer to the totality of causes, not to their sequence, or their proximity or remoteness. Put this

case. Assume a vessel sailing on the same voyage as the Linwood, the master being acquainted with the fact that there was no light on Cape Hatteras. Every one is aware, that, although light-houses are of immense advantage, yet they have been the cause of many wrecks, by inducing mariners to sail nearer to the land than they otherwise would. Suppose, knowing that there was no light, the master had changed his course to the Eastward, and in consequence was wrecked on one of the West India islands. To take the case one step further,—suppose the vessel was so wrecked in consequence of the want of a light on the island, which light had been extinguished by a mariner tired of life and embittered against all mankind. In one sense unquestionably the vessel might be said to have been wrecked in consequence of the absence of the light at Cape Hatteras: but, would any person in his senses say that that would be a consequence which was covered by this exception? If you cannot presume the exception of loss from a consequence of hostilities to involve all consequences however remote, you are necessarily driven to say that the word "consequences" is to be dealt with according to the ordinary rule, as meaning proximate consequences only. Nor is this a rule which is applied for the benefit of the assured only: it is equally applicable for the benefit of the insurers. For an instance of that, it is enough to refer to the case of De Vaux *v.* Salvador, 4 Ad. & E. 420 (E. C. L. R. vol. 31), 6 Nev. & M. 713. There the ship came into collision with a steamer in Hooghly River, and both sustained considerable damage. The claim of the owner of the ship against the owner of the steamer having been referred to arbitration, it was awarded that each vessel should bear half *the joint expenses of the two, in conformity with the rule of the maritime law. Under this award, the ship had to pay a balance to the steamer, and the owner of the ship brought an action against his underwriter for the sum he had thus been obliged to pay, as a particular average loss by perils of the sea. But the Court of King's Bench held that he could not recover. "The obligation," said Lord Denman, C. J., "to pay the sum in question is neither a necessary nor a proximate effect of the perils of the sea, but growing out of an arbitrary provision of the law of nations from views of general expediency, not as dictated by natural justice, nor probably quite consistent with it." Applying that rule to the present case, it seems to me that the loss was a consequence of the perils of the sea, and not a consequence of hostilities. [*291

2. I now come to the second point of the case, viz., with reference to the wreck and its effects. I prefer dealing with that before I consider the effect of hostilities. The circumstances under which the vessel became wrecked have already been stated: it is enough, in order to introduce my judgment upon this point, to state that the vessel was stranded and could not be got off, and was totally lost from the moment she went on the rocks. With respect to the cargo, the general rule of law, I apprehend, is simple. The vessel being wrecked and partly submerged, those facts of themselves would give a right to abandon, not only as regards the vessel, but also as regards the cargo. I may refer to Emerigon, edit. 1827 by Boulay-Paty, Vol. 1, 401, 2 (edit. 1783, Vol. 1, p. 404), to show that we are acting upon no new principle. Treating of Bris et Naufrage, that learned author

gives an instance of a vessel going on shore and becoming a wreck, part of the cargo being saved in a damaged and part in an undamaged state; and it was considered *by very high authority that this
*292] state of things gave a right to abandon: and he states this for the reason given by Mr. Maclachlan, viz., that the law in these cases avoids the raising of questions which in many instances it would be quite impracticable to determine. I am quite aware that this has not been adopted to the full extent in our jurisprudence or in that of America: but it is in favour of the proposition put by my Lord, that, where the vessel is cast ashore without hope of being saved, that may well be treated as a total loss. However, the authorities appear to furnish an intelligible rule, viz., that, where there is a wreck of the vessel without hope of recovery, the cargo may be treated as also lost if the circumstances are such that no part of it can be recovered for the benefit of the party insured. Take the case of a vessel wrecked on an uninhabited island in the middle of the ocean, where the removal of the goods from her, and sending out another vessel to carry them on, would be ruinous as compared with their value when thus obtained. There undoubtedly you have a total loss immediately. Suppose a like case of wreck where the island is inhabited by savages, and part of the cargo is saved, but the crew are forcibly deprived of it. There again you have a case of total loss. That was the case of Bondrett *v.* Hentigg, Holt, N. P. C. 149 (E. C. L. R. vol. 3). Part of the goods were lost, and part got on shore, but was plundered and destroyed by the inhabitants of the coast, so that no portion of it ever got to the possession of the assured. Gibbs, C. J., deals with that as a case of total loss; and the reason he gives, is, that the portion of the goods which was saved from the wreck, though got on shore, never came again into the hands of the owners. Under those circumstances, he treats that as a total loss the proximate consequence of the wreck. To constitute a case of total loss, therefore, it is not
*293] *necessary that the ship should be placed in such a situation that it is physically impossible to get the goods out of her; but you must take all the circumstances into account, for the purpose of determining whether any part of the goods can be saved for the benefit of the owners. Take again the case of a vessel going down at the entrance of a dock at her port of destination, the cargo remaining capable of being restored with but little difficulty and expense. That is putting extreme cases either way. Now, what are the facts to which these rules and considerations are to be applied? You have a vessel absolutely and irrecoverably wrecked; and you have a cargo on board in this condition, that, of 6500 bags of coffee, it is possible to save 1150 bags, but impossible to save the remaining 5350 bags. I apprehend the conclusion, upon that state of facts, in good sense and in law, is, that the 5350 bags which there is no hope of saving, and the loss of which is certain when the vessel strikes, are as absolutely lost as the vessel herself. As to 1000 bags, in an ordinary state of things, if there had been no hostilities, they would have been saved, and 150 bags actually were saved,—and saved for the owner (subject to salvage), if nothing had intervened. I do not use the word partial, because it is ambiguous. There may be a total loss of half a cargo. Here there were 5350 bags totally lost for all purposes as

between these parties; 150 bags actually saved; and 1000 bags the landing of which was prevented by acts of hostility, in the sense I before adverted to.

3. That introduces the third part of my judgment, viz., with reference to the hostile seizure. It is clear that 1000 bags of the coffee would have been saved but for hostilities, and the rest (except the 150) lost. I agree that it was by a consequence of hostilities that the 1000 bags were not saved. But the question *is whether the hostilities had any effect in bringing about the loss of the rest of the cargo. With respect to Hahn *v.* Corbett, 2 Bingh. 205, 9 J. B. Moore 390, I think the counsel for the defendants have succeeded in establishing a sound distinction between that case and this as to the 1150 bags, because the vessel was in such a position that there was no possibility of the goods being saved, under the circumstances, for the benefit of the insured; there was no spes recuperandi. The goods when taken out were taken by the enemy, and were totally lost to the owners. On the other hand, I do not think that the case of Livie *v.* Janson, 12 East 648, which was said to be exactly in point, at all applies here; because, in that case what took place before the capture was a simple deterioration of the ship: there was no total loss of any part of the adventure: the vessel was injured but not destroyed by the perils of the sea; and it was said that her subsequent immediate capture had the effect of entirely putting out of question the previous injury which she had sustained, because, had she been the best equipped vessel that ever sailed, she would have been lost to the owner by reason of a peril insured against. That appears to me to be wholly inapplicable to a case where there has been a previous absolute total loss by perils of the sea. I cannot pass away from the case of Livie *v.* Janson without referring to Mr. Phillips's very able and learned work on Insurance, Vol. I., p. 673, where he throws doubt upon the authority of Lord Ellenborough's decision, referring to cases in the American courts where the principle of that case has not been applied to the case of an absolute loss of a portion of the thing insured. Without, however, going the length of saying that Livie *v.* Janson is not law, I am clear that it can only apply to a case where the vessel is deteriorated, and not to a case where there *has been a loss of the subject-matter of the insurance by the perils of the sea. [*294 [*295

Now, coming a little closer to the question in hand, viz., whether there was a loss by capture of the 5350 bags which remained on board: and for this purpose I will assume that Livie *v.* Janson does apply. It appears to me that there was no capture of those 5350 bags. They were incapable of being saved: and it seems to me to be an abuse of words to say that a man captures a thing which must of necessity be snatched from his grasp the very next moment,—of which he can have no enjoyment and no possession. It has been said Ipsum compedibus qui vinxerat Emosigæum. But, to say that a man captures a cargo which is in a ship on the rocks and cannot by possibility be got at, is to say that which has no foundation in fact. The 5350 bags were lost to the assured and to all mankind from the moment the ship settled on the rocks, without a possibility of their being brought on shore. The result is, that, in my opinion, of the 6500 bags of coffee,

5350 were lost by the perils of the sea, 1000 by the consequences of hostilities, and 150 were saved. As to the former, therefore, I think the plaintiff is entitled to judgment, and as to the rest the defendants.

BYLES, J.—I am of the same opinion. I must confess that I have never felt more assisted by the arguments of counsel than I have been by the very able arguments which we have heard in this case. The result is to make it in my judgment a perfectly clear case.

1. The first question is, was the vessel lost through the absence of the light at Cape Hatteras. In order to raise that question, we must assume, that, if the light had been there when the captain of the
*296] Linwood *altered the course of his vessel on the evening of the 17th of July, he would have seen it, and, having seen and recognised it, would have had time to turn about and save the vessel. It is true that that is all conjecture. But, assuming all that, is the absence of the light,—which was at the most merely the absence of an extrinsic saving power,—a link in the chain of causes to which the destruction of the ship is to be imputed? I do not propose to attempt to discriminate between the various descriptions of causes, with their effects or results: that is a matter which was discussed two thousand years ago by abler intellects than any now existing. But this is plain, and is admitted on all hands, that, in the construction of the contract of insurance, the proximate or immediate cause of the loss alone is that to which we can look. That is established law throughout all Europe and America. There is no doubt about it; and every judgment of our courts must proceed upon the hypothesis that this is established law. Then, what were the three things which combined to cause the loss,—assuming that the captain would have seen the light if there, and so would have been warned in time to save the vessel? First, the original meritorious cause (and in popular language *the cause* of the loss), was, the captain's being out of his reckoning. He was some fifty miles to the westward of his course, without knowing it. The absence of the light was, as I before observed, merely the absence of an extrinsic saving power. Could that be said to be the cause of the ship's destruction? Suppose a man throws himself into the Serpentine, and the means of rescuing him are not at hand, and he is drowned. Could it be said in that case that the man was drowned because of the absence of the saving power? Apply that here. The absence of the light at Cape Hatteras was but
*297] the absence of a warning, *leaving the proximate and immediate cause of the loss, the miscalculation of the captain, which is plainly a loss by the perils of the sea. The only momentary doubt I have felt was when listening to the argument of Mr. Mellish. Suppose, he said, there had been a contract between the owner of the light-house and the now plaintiff to keep the light burning, and in consequence of the neglect of the former the plaintiff's vessel was wrecked, could anybody doubt that the plaintiff would have a good cause of action? Certainly not. But there would be a contract against the remote and indirect damage occasioned by the absence of the extrinsic saving power, just as much as if it had been expressed in so many words; for, a vessel cannot be lost by the absence of a light, except as an intervening cause; and in a contract of that kind a loss by sub-

sequent sea-damage would necessarily be included. That hypothesis, therefore, does not impose any real difficulty.

2. Upon the second question, I must confess I have felt some difficulty. When the ship first struck the ground, no doubt, the cargo was not totally lost. A cargo is, as a general rule, said to be totally lost when the goods no longer exist in specie, when by the progress of decomposition they have wholly changed their character, and, as has been strongly put in some of the cases, exist only in the shape of a nuisance. So, it is lost when it has become inaccessible by being cast on the top of a rock or sunk in the bottom of the ocean. That was not the case here. The cargo existed in specie, and was accessible, after the ship was cast on shore. The salvors got out 150 bags of coffee, and would have saved 1000 more if they had not been interrupted. My Lord and my Brother Willes have already pointed out the distinction between the present case and Hahn *v.* Corbett, 2 Bingh. 205 (E. C. L. R. vol. 9), 9 J. B. *Moore 390. Since I had the pleasure of hearing Mr. Mellish's argument, I have had an [*298 opportunity of looking carefully at that case: and, whatever were the facts, the Chief Justice undoubtedly bases his judgment distinctly upon the loss of the goods at the time the vessel was lost. "It has been asked," he says, "*when* the goods can be said to have been lost. When the ship was totally lost. There is no statement that any other ship was at hand, or that any land was near. If the underwriters were exempted from liability on capture by an enemy, they were not entitled to calculate on preservation of the goods by an enemy: but, if the enemy had not come, it is clear the goods would never have been moved, because the ship never moved. It was just as if they had been cast on a rock and had been completely out of reach. The goods, therefore, were lost when the ship was lost; and what happened afterwards makes no difference in the case." That case, therefore, opposes no difficulty here: the goods there were totally lost. Here, there was originally no total loss of the goods, but a partial loss only. There was afterwards a total loss of the entire cargo so far as the owners of it were concerned; but, as to a portion, not a loss by the perils of the sea. One hundred and fifty bags of the coffee were saved uninjured; and 1000 bags more would have been saved, had not the confederate troops interposed. The result seems to be clear: the 1000 bags and 150 bags fall within the exception, of a loss the consequence of hostilities; and, as to those which remained on board the vessel, and which could not be got out, that was a loss by the perils of the sea.

KEATING, J.—I am entirely of the same opinion. The principal question arises upon the construction of the words of the warranty,—"warranted free from all *consequences of hostilities, riots, or commotions." For the reasons given by my Lord and my two [*299 learned Brothers, it seems to me that the intention of the parties by that exception was, to warrant the freedom from all consequences of hostilities as the cause of the loss. That being so, it is admitted on all hands that the underwriters undertake by the policy to indemnify the assured against all losses by the perils of the sea. If the warranty is to be read as I have stated, then, according to the universal construction of marine policies, the cause means the immediate and proxi-

mate cause. That the putting out the light at Cape Hatteras was not the immediate and proximate cause of the loss here, I conceive to be quite clear. I also agree with the rest of the court, that the loss was a partial loss. Mr. Mellish most accurately expressed himself when he said, that, so long as the coffee remained in specie as coffee in the possession and under the control of the captain and crew, and capable of being saved, there could be no total loss. But, as to the 5350 bags which it is conceded that no human power could save, the moment the ship struck the ground, these no longer remained in the possession or under the control of the captain and crew in a capacity to be saved. They were then potentially lost, as much as they subsequently proved to be actually lost. As to the rest, 150 bags were saved, and 1000 more might have been saved but for the intervention of the confederate troops. As to these, therefore, the loss was clearly a consequence of hostilities. The result will be, that, as to 5350 bags, the verdict will be for the plaintiff, as to the residue, for the defendants.

Sir G. Honyman.—It was arranged that it should be referred to Mr. Richards, the average-stater, to *settle the amount. There will be salvage to be deducted.

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WILLES, J.—That comes under the suing and labouring clause. Salvage is only chargeable in respect of a peril covered by the policy. Here the whole of that to which salvage would apply is out of the policy.

There was some discussion as to whether it should be referred to Mr. Richards to ascertain the number of bags actually and potentially saved: but ultimately it was arranged that the whole number which were or might have been saved should be taken to be 1020 bags.

Rule accordingly.(a)

(a) "To enter the verdict for the plaintiff in respect only of the loss of 5480 bags of coffee, and for the defendants in respect of 1020 bags;" and by consent of counsel, "referred to Mr. Richards, the average-stater, to ascertain the value payable by the defendants in respect of the said 5480 bags, and that the verdict be entered for such amount accordingly."

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*301] *Ex parte* JONES. *May* 1.

The court will not allow articles of clerkship to be enrolled nunc pro tunc, and the service under them to be reckoned as from their date, where there has been an omission to cause them to be stamped within the time required by law,—even though the Treasury has accepted the stamp-duty with a penalty,—unless it is shown that the omission has been the result of some unforeseen emergency, or of the failure of some just expectation. The mere disappointment of a vague hope, will not suffice.

HAYES, Serjt., moved that the affidavit of the execution of the articles of clerkship of Edward Jones be enrolled nunc pro tunc, and the service be permitted to count from the date of the articles, notwithstanding the stamp-duty thereon had not been paid within the six months allowed by the statute 7 G. 4, c. 44, s. 4.

The affidavit upon which the motion was founded, stated that the applicant entered into the service of his father, an attorney, in the year 1850, but was not articled, neither of them being in a position to defray the necessary charges; that he remained with his father until 1861, for the last five years managing his business; that in the course

of that year, the father's circumstances becoming embarrassed, he gave up practice, and in the month of October of that year the applicant entered the service of another attorney; that, being induced by a friend to believe that the necessary funds could be raised in a month or six weeks, and acting on the advice of his father, the applicant was in November articled to the gentleman whose service he had entered, but, being disappointed of the money he had hoped to raise, he was unable to get the articles stamped within the six months; and that he thereupon memorialized the Treasury and was allowed by the lords commissioners to stamp the articles on the payment of the duty and a penalty of 20*l.*, under the 19 & 20 Vict. c. 81, s. 3.

This court allowed this to be done on similar grounds in Ex parte Bishop, 9 C. B. N. S. 150 (E. C. L. R. vol. 99). And in a case of Ex parte Herbert, 31 Law J. Q. B. 33, 1 Best & Smith 825 (E. C. L. R. vol. 101), one H. entered into articles of clerkship as an attorney with his father, and duly *served his clerkship for the five years from their execution. He did not know till nearly the [*302 end of his time that it was necessary that the articles should be stamped and enrolled. After his service was out, the articles were handed to him by his father, who had always kept possession of them, and, being unstamped, on application to the lords of the Treasury, they permitted them to be stamped, on payment of 50*l.* penalty, pursuant to the 19 & 20 Vict. c. 81, s. 3. The father made affidavit that he omitted to have the articles stamped and enrolled within six months of the execution, from his being "wholly without the means of paying the stamp-duty, and because he thought, that, under the above section, they could be stamped afterwards on payment of a penalty; and that he had no pre-conceived plan to article his son speculatively, but solely with the intention of ultimately stamping and enrolling the articles." The Court of Queen's Bench, under the circumstances, upon the authority of Ex parte Bishop (Crompton, J., dissenting), allowed the articles to be enrolled and the service under them to be computed from the date of their execution. In giving judgment, Cockburn, C. J., says: "The court has always been ready to interfere for the protection of the revenue: but, under this recent act, the revenue can interfere and protect itself; and, if the lords of the Treasury, after inquiry, think fit to allow the articles to be stamped, we ought to assume that they are the best judges of what is essential for the best interests of the revenue." And Wightman, J., says: "The courts formerly had to protect the revenue when articles were not duly stamped. By the 19 & 20 Vict. c. 81, s. 3, the difficulty is obviated by the power which the Treasury has given to it to order, at its discretion, instruments to be stamped after the six months, on payment of certain penalties. It may be, *if the Treasury were of opinion that the loss was not obviated by the penalty [*303 of 50*l.*, they would not interfere: but, whether it be for the loss or gain of the revenue, they are the best judges; and, they having decided to allow the articles to be stamped, I do not see why this court should interfere." [ERLE, C. J.—I do not understand that we are to surrender our discretion because the lords of the Treasury are content to take the duty and the penalty. In Ex parte Breden, 12 C. B. N. S. 351 (E. C. L. R. vol. 104), we yielded to an application of

this sort where it was made to appear that the omission to pay the duty at the proper time was the result of an emergency which might be justly inferred to have been unforeseen by the party. But, here, the father says to the son, "Let us article you, and we will trust to a kind Providence that the money will somehow be forthcoming!" That is not the sort of emergency that I can act upon.] Looking to all the circumstances here,—seeing that the parties were acting bonâ fide upon a reasonable expectation that the money would be forthcoming in due time, that there was no intention to speculate, and that the failure was simply the result of family misfortunes, and seeing that the claims of the Treasury are satisfied,—it is submitted that this case may quite as fairly be said to fall within the category of unforeseen emergency as that of Ex parte Bishop.

ERLE, C. J.—I am of opinion that this application should be refused. In the case of In re Breden, we laid down the rule in these words: "The legislature has required the courts to see that many conditions intended to secure skill and respectability in attorneys have been complied with, among others, indirectly, that the stamp-duty on the articles of clerkship has been paid. As to this payment, the Treasury has a *direct duty in respect of the revenue; but, beyond that, the judges have a duty to see either that the money has been paid in due time, or the delay accounted for, before they allow the enrolment, and order the service to count from the date of the articles." Uniformly, whilst I was in the Court of Queen's Bench, and since I have sat here, where it has been shown that the party had a right to expect that the money had been or would be duly paid, but contrary to good faith and to his just expectations the promise he relied on was broken, we have considered that to be an emergency entitling him to indulgence. The case of In re Breden was one of the strongest cases of that sort that could be. The applicant had been the managing-clerk to an attorney who died leaving a widow and a young son who could not take up the business and carry it on. He gave his services to them and their friend to keep the business together, and succeeded in so doing. The son, as soon as he was admitted an attorney, gave him his articles; and the widow promised to pay the stamp-duty. The widow failed to perform her promise; and, when his belief in the widow failed, the clerk obtained the money from another source, and paid the duty and the penalty himself. A more meritorious case could hardly be presented to the court. In Ex parte Bishop, where the circumstances were something of the same description as those of the present case, the court were going to refuse the application; but, finding that the money had been paid upon the faith of an intimation of my Brother Willes,—who, from having examined the parties at Chambers, knew all the merits of the case,—that he intended to make the order, we allowed it to be done. It was entirely upon what passed between my Brother Willes and the court that that case proceeded. In Ex parte Herbert, 31 Law J. *Q. B. 33, 1 Best & Smith 825 (E. C. L. R. vol. 101), the Court of Queen's Bench certainly seem to have proceeded upon a very vague set of premises. They were persuaded to come to the conclusion they did upon the supposed authority of Ex parte Bishop, and they,—the majority of them, at least,—seem to express an opi-

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nion, that, since the recent statute, it is entirely a matter of revenue, and that, if the lords of the Treasury are content to take the money, the court ought to be satisfied too. I cannot but say that the words I first read contain my deliberate opinion and the opinion of the courts upon this subject for a very long period of time. The court is not to hold a solemn inquiry merely for the purpose of learning whether or not the Treasury has accepted the duty and penalty. It would be hardly consistent with the duty of the court to sit for a whole hour merely to discuss a matter of that sort. I cannot assent to anything so contrary to reason. The Court of Queen's Bench thought we had set them the example: but the case of Ex parte Bishop certainly did not intend to lay down any such doctrine. I found my judgment in this case upon the principles I have already mentioned. The applicant here had no reasonable or well-founded expectation that he would be prepared with the money. He entertained a strong hope that somehow or other he would find the money. I do not consider that to be such an expectation as ought to be acted upon. I see no such unforeseen emergency in this case as to constitute it an exception to the general rule.

The rest of the court concurring, *Hayes* took nothing.

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*GAMBART *v.* BALL. *April* 30. [*306

The piracy of a picture or engraving by the process of photography, or by any other process mechanical or otherwise whereby copies may be indefinitely multiplied, is within the statutes (8 G. 2, c. 13, 7 G. 3, c. 38, and 17 G. 3, c. 57) for the protection of artists and engravers.

THIS was an action for the infringement by the defendant of the plaintiff's copyright in two engravings, the one from Rosa Bonheur's "Horse Fair," the other from Holman Hunt's "Light of the World."

The cause was tried before Willes, J., at the sittings in London after last Michaelmas Term. It was proved that the plaintiff was the proprietor of the two engravings above mentioned, and that the defendant had copied them on a very reduced scale by means of photography, and sold a great number of copies. The question raised, was, whether copying by means of photography was an infringement of the copyright of the proprietor within the meaning of the Copyright of Engravings Acts, 8 G. 2, c. 13, 7 G. 3, c. 38, and 17 G. 3, c. 57.

Under the direction of the learned judge, a verdict was entered for the plaintiff, leave being reserved to the defendant to move to enter the verdict for him if the court should be of opinion that what he did was not an infringement within the above statutes.

Coleridge, Q. C., in Hilary Term last, obtained a rule nisi accordingly.—He submitted that the object of the legislature was to protect the original designer from having his design copied by painting, and the engraver from having his work pirated by engraving; and that the statutes were never intended to apply, and are wholly inapplicable to the re-production by means of the new art of photography. He referred to Murray *v.* Heath, 1 B. & Ad. 804, to the 6 & 7 W. 4, c. 59, which extended the above-mentioned statutes to Ireland, and to

*307] the observations of the Master of the *Rolls thereon in Turner v. Robinson, 10 Irish Chancery Reports 121, 510, and also to the International Copyright Act, 15 & 16 Vict. c. 12, s. 14.

Collier, Q. C., Prentice, and *W. T. Brandt*, now showed cause.—The question is whether a re-production of an engraving by the process of photography is within the meaning of the acts for the protection of engravings. The 8 G. 2, c. 13, is intituled "An act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers, during the time therein mentioned:" and, after reciting that "divers persons have by their own genius, industry, pains, and expense, invented and engraved or worked in mezzotinto or chiaro oscuro sets of historical and other prints, in hopes to have reaped the sole benefit of their labours; and that print-sellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof,"—enacts, that "every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved, with the name of the proprietor, on each plate, and *308] printed on every such print or prints; and that, if any print-seller *or other person whatsoever, within the time limited by this act, shall engrave, etch, or work as aforesaid, or in any manner copy and sell, or cause to be engraved, etched, or copied, and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, re-print, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had or obtained in writing, signed by him or them respectively in the presence of two or more credible witnesses, or, knowing the same to be so printed or re-printed without the consent of the proprietor or proprietors, shall publish, sell, or expose to sale, or otherwise or in any other manner dispose of, or cause to be published, sold, or exposed to sale, or otherwise or in any other manner disposed of, any such print or prints, without such consent first had and obtained as aforesaid, then such offender or offenders shall forfeit such plate or plates on which such print or prints are or shall be copied, and all and every sheet or sheets (being part of or whereon such print or prints are or shall be copied or printed), to the proprietor or proprietors of such original print or prints, who shall forthwith destroy and damask the same; and, further, that every such offender or offenders shall forfeit 5*s.* for every print which shall be found in his, her, or their custody, either printed or published and exposed to sale or otherwise disposed of contrary to the true intent and meaning of this act." The next act, the 7 G. 3, c. 38, which was passed in consequence of

the decision of Lord Hardwicke in Jefferys *v.* Baldwin, 1 Ambler 164, extends the protection to any person making an engraving from the original work of another. Its title is, "An act to amend and render more effectual an act made in the 8 G. 2 for encouragement *of the arts of designing, engraving, and etching historical and [*309 other prints, and for vesting in and securing to Jane Hogarth, widow, the property in certain prints." The 1st section recites that the former act had been found ineffectual for the purposes thereby intended, and enacts that "all and every person and persons who shall invent or design, engrave, etch, or work in mezzotinto or chiaro oscuro, or from his own work, design, or invention, shall cause or procure to be designed, engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, shall have, and are hereby declared to have, the benefit and protection of the said act and this act," under the restrictions and limitations thereinafter mentioned. The 2d section enacts, that "all and every person and persons who shall engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, shall have and are hereby declared to have the benefit and protection of the said act and this act for the term hereinafter mentioned (28 years, s. 7), in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draftsman; and, if any person shall engrave, print, and publish, or import for sale, any copy of any such print, contrary to the true intent and meaning of this and the said former act, every such person shall be liable to the penalties contained in the said act, to be recovered as therein and hereinafter is mentioned." And s. 3 reserves to Hogarth's widow the sole right of printing and re-printing his engravings for twenty years from the 1st of January, 1767. Then came the 17 G. 3, c. 57, upon which this action is founded, [*310 *which, after reciting that the former acts "had not effectually answered the purposes for which they were intended, and that it was necessary, for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as were thereinafter mentioned and contained," enacts, that, "if any engraver, etcher, print-seller, or other person, shall, within the time limited by the aforesaid acts or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked, in mezzotinto or chiaro oscuro, or otherwise or *in any other manner* copy, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, re-print or import for sale, or cause or procure to be printed, re-printed, or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, which hath or have been or shall be engraved, etched, drawn, or designed in any part of Great Britain, without the express consent of the proprietor or proprietors thereof

first had and obtained in writing, signed by him, her, or them respectively with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor or proprietors shall and may by and in a special action upon the case to be brought against the person or persons so offending recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with double costs of suit." The 15 & 16 Vict. c. 12, s. 14, declares that the provisions *311] *of the above acts, and also of the 6 & 7 W. 4, c. 59, "are intended to include prints taken by lithography or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely, and the said acts shall be construed accordingly." The question is, whether a resemblance taken by means of photography, which is a mechanical as much as a chemical process, is not a "copy" within the meaning of these acts. It is the most perfect of all known modes of taking copies: every line and every shade is re-produced exactly as in the original; and there is no limit as to the size in which it may be taken. In Webster's Dictionary, a "copy" is said to be "a likeness or resemblance of any kind,"—"the form of a picture or statue according to the original." [WILLES, J.—The argument on the other side is, that the statutes by "copy" mean only that which is intended to pass or which may pass for the original print or engraving; and that a multiplication by an art or process at the time unknown cannot have been in the contemplation of the legislature.] In West *v.* Francis, 5 B. & Ald. 737, 743 (E. C. L. R. vol. 7), 1 D. & R. 400, Bayley, J., says: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." If these are not copies of the plaintiff's pictures, what are they? It can make no difference that the art of photography was not known at the time these acts passed. A copy by means of photography is the most pernicious of all copies, seeing that such copies may be indefinitely produced at a comparatively trifling cost. [WILLES, J.—Would a pen-and-ink copy be within the acts?] It is submitted that it would. The 25 & 26 *312] Vict. c. 68 (*a*) *leaves this question untouched, probably because the legislature conceived it to be already provided for by the former acts.

Coleridge, Q. C., and *Rew*, in support of the rule.—The object of the legislature in passing the statutes upon which this question arises, was to remedy certain specific evils; and their language is not to be extended by intendment to a supposed evil which could not have been within their contemplation. It is submitted that photography was not within the contemplation of the earlier statutes; and that the copies in question are not within the mischief which was aimed at, even if the court should be of opinion that the prohibition extends to

(*a*) The 1st section of that statute enacts that "the author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing and *photograph* which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death," &c.

the multiplication of the original by any means. That they are not within the words of the acts, is clear. Copyright, at common law, in a thing which has been published, must, since the decision of the House of Lords in Jefferys *v.* Boosey, 4 House of Lords Cases 815, be considered as out of the question. If any exists at all, it must be under some statute. The mischief pointed at by the first act, 8 G. 2, c. 13, was, injury to the reputation of the artist by putting forth base imitations. The protection afforded by that act being found inadequate, the 7 G. 3, c. 38, was passed. The 2d section of that act for the first time extends the protection to *engravers;* and the piracy *there pointed at is by engraving and printing. Then comes the 17 G. 3, c. 57, which recites the two former acts, and professes to render their provisions more effectual: it speaks of copying in any other manner than by engraving, etching, or working in mezzotinto or chiaro oscuro. These words, however, being found in an act of parliament creating a monopoly, are not to be unreasonably or unnecessarily extended: they must, consistently with the general rule which guides the construction of acts of parliament, be held to refer to a multiplication of copies in any other manner ejusdem generis with those described in the particular words which precede them. If the thing with which the defendant is charged is not within the two earlier statutes, it is impossible to say that anything could have been contemplated by the legislature as falling within these general words which was not in the minds of those who framed the former acts. The 17 G. 3, c. 57, was merely intended to increase the protection against the old grievance. Then comes the 15 & 16 Vict. c. 12, s. 14, which extends the provisions of the former acts to "lithographs and certain other impressions." [WILLES, J.—It declares that they are within them.] It protects lithographs from being pirated. At the time that act passed photography was well known; and yet no mention is made of it, for it can hardly be said to fall within the description of "a mechanical process." The cases of Murray *v.* Heath, 1 B. & Ad. 804 (E. C. L. R. vol. 20), and West *v.* Francis, 5 B. & Ald. 737 (E. C. L. R. vol. 7), 1 D. & R. 400, throw no light whatever upon the subject. The statutes 38 G. 3, c. 71, 54 G. 3, c. 56, and 13 & 14 Vict. c. 104, ss. 6, 7, which deal with the sister art of sculpture, are very much in pari materiâ. Their object was to protect the sculptor against spurious imitations of works of genius by reproducing them either in marble or plaster of Paris,—not against *drawings or other similar representations of them. Then, these little photographs, though in some sense copies, clearly are not copies against which the act was levelled. They cannot deceive; and they address themselves to a totally different and distinct class of purchasers. If they are copies within the act, wood-cuts, worsted-work, and the coarse paintings on porcelain dinner or dessert-services must equally be within it. [KEATING, J.—Do you go the length of saying that there can be no "copy" of an engraving, within the act, otherwise than by means of an engraving?] Yes, though for the purposes of this case it is not necessary to push the argument quite to that extent. [BYLES, J.—May a man make and sell a pen-and-ink copy of a print, without being guilty of an infringement of the rights of the proprietor?] Unquestionably, he may. To constitute the offence, the copy

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must be a thing which may be taken for that which it represents. All that is required to be guarded against in the case of a work of art, is, spurious and deceptive imitation. Take away from a picture its colour, form, and size, and you take from it all its beauty and attraction.

ERLE, C. J.—The question raised for our consideration in this case, is whether the publication and sale of photographic copies of an engraving in which there is a subsisting copyright, is an infringement within the meaning of the 8 G. 2, c. 13, 7 G. 3, c. 38, and 17 G. 3, c. 57. I am of opinion that it is. The code of statutes protecting the rights of engravers begins with the 8 G. 2, c. 13. That statute recites that divers persons have by their own genius, industry, pains, and expense, invented and engraved or worked in mezzotinto or chiaro oscuro sets of historical and other prints, in hopes to have reaped the sole benefit of their labours; and that print-sellers and other persons
*315] have of late, *without the consent of the inventors, designers, and proprietors, of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, *base copies of such works, designs, and prints*, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof. But the preamble does not control the enacting part of the statute: and the enacting part, after vesting in "every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical or other print or prints," the sole right of printing the same for fourteen years, goes on to provide, that, "if any print-seller or other person whatsoever, within the time limited by this act, shall engrave, etch, or work as aforesaid, *or in any manner copy* and sell, or cause to be engraved, etched, or copied, and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, re-print, or import for sale, or cause to be printed, re-printed, or imported for sale, any such print or prints, or any parts thereof," without consent, "or, knowing the same to be so printed or re-printed without the consent of the proprietor or proprietors, shall publish, sell, or expose to sale, or otherwise in any other manner dispose of, or cause to be published, &c., any such print or prints, without such consent first had and obtained as aforesaid," such offender shall incur certain penalties. That statute in its enacting part goes, as it seems to me, very much beyond the evil suggested by Mr. Coleridge, viz. the injury to the fame and reputation of the artist by the circulation of inferior imitations of the productions of his genius. Engravings are things having a commer-
*316] cial value, and the *statute gives protection to the money value of the creation of the artist's mind. Then came the 7 G. 3, c. 38, which, extending the period from fourteen to twenty-eight years, gives the same sort of protection to the *engraver* who puts on the plate the creations of the mind of another: but the words of prohibition in that act are not so wide as those of the statute I am about to refer to. The statute upon which this action is more immediately founded, is the 17 G. 3, c. 57. The title of that act is, "An act for more effectually securing the property of prints to inventors and engravers by enabling them to sue for and recover penalties in cer-

tain cases." It recites the two former acts, 8 G. 2, c. 13, and 7 G. 3, c. 38, and further recites that those acts "had not effectually answered the purposes for which they were intended, and that it was necessary, for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as were thereinafter mentioned and contained." And it enacts, that, "if any engraver, etcher, print-seller, or other person, shall, within the time limited by the aforesaid acts or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked, in mezzotinto, chiaro oscuro, or otherwise *or in any other manner copy*, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, re-print, or import for sale, or cause or procure to be printed, re-printed, or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, &c., which hath or have been or shall be engraved, etched, drawn, or designed in any part of Great Britain," without consent *&c., the offender shall be liable to an action, &c. That statute [*317
contains very wide words for the protection of the proprietor of an engraving against piracy. The question is, whether a photographer who has taken a photograph of an engraving or print has in any manner copied that engraving or print. The very statement of the proposition suggests the answer. The object of the statute, to my mind, was, not merely to prevent the reputation of the artist from being lessened in the eyes of the world, but to secure to him the commercial value of his property,—to encourage the arts, by securing to the artist a monopoly in the sale of an object of attraction. If that be the object of the statute, it is plain that a photographic copy may excite in the mind of the beholder the same pleasurable emotions as would be communicated by a copy of any other description: and I see no reason why these very wide and general words should not be construed according to their plain and ordinary meaning, and be held to apply to any mode of copying known at that time and to such other modes of multiplying copies as the ingenuity of man may from time to time discover. Is a reproduction of the print by photography a manner of copying? To that I answer in the affirmative: and, whether the photographic copy is of the same size as the original, or is enlarged or very much diminished, the statute has in terms provided for that. It is not the extent of the paper covered by the picture which conveys the pleasure to the mind. Thus, in the representation of "The Horse Fair," we feel the same degree of pleasure in looking at the forms and attitudes of the beautiful animals there portrayed whether we see them in the size in which they are drawn in the original picture, or in the reduced size of the engraving, or in the still more diminished form in which they appear in the [*318
*photograph. I cannot help thinking that the value of the plaintiff's property would be sensibly diminished if the multiplication of copies by means of photography were held to be lawful. It seems to me that the making of copies in that way and selling them is with-

in the words as well as the mischief of the act. For these reasons I am of opinion that the plaintiff is entitled to retain his verdict.

WILLES, J.—I am of the same opinion, though I own that I should not have been disposed to concur if it had been necessary in the view we take of the statute to hold that a copy made by pen or pencil would be an infringement. I think the statute is capable of being explained as read by my Lord, so as to include any process in the arts the result of which is to produce an indefinite number of copies. Etching is partly a mechanical and partly a chemical process. Notwithstanding the ordinary rule of construction, that general words in a statute following particular words are to be restricted in their meaning to the particular words preceding, I think the word "copy" here may very well apply to a copying by any process by which copies may be indefinitely multiplied. To comprehend these, the act need not, as it appears to me, be construed to extend to a copying by hand. Copying by means of photography falls clearly within the mischief of the statute, and, construed in the manner pointed out by my Lord, within its words also. I have thought it necessary to add this explanation, because at first I felt a difficulty as to copying by hand. The defendant has been guilty of an infringement, and the rule must be discharged.

BYLES, J.—I am entirely of the same opinion. It is unnecessary to answer the question I put to Mr. Rew, *viz., whether a man might make and sell a pen-and-ink copy of a print, without being guilty of an infringement of the rights of the proprietor. The confusion of words in these statutes is great; but I think no one will say that they will fail for want of words. The 17 G. 3, c. 57, enacts, that, if any engraver, etcher, print-seller, or other person, shall engrave, etch, or work, or cause, &c., in mezzotinto or chiaro oscuro, or *otherwise or in any other manner copy*, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, re-print, or import for sale, &c., or shall publish, sell, or otherwise dispose of, &c., any print, &c., without the consent of the proprietor, certain consequences shall follow. What would be the case if the alleged infringement were, as suggested, the transferring the design to a carpet, or a piece of Berlin wool-work, or a porcelain table-service, one need not inquire. But I entertain no doubt that the statute includes all processes for the indefinite multiplication of copies, whether mechanical or otherwise. When the statute declares mechanical processes of multiplying copies to be within it, no doubt it would have declared the multiplication by means of photography to be within it, if the art of photography had then been known. It is a process partly mechanical and partly chemical.

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KEATING, J.—I am of the same opinion. The object of these acts of parliament was not simply the protection of the reputation of the artist or the engraver, but to protect him against the invasion of his substantial commercial property in the work of his genius or of his industry. That being so, in order to be satisfied that a multiplication of copies by means of photography would seriously invade that property, one need only look at the beautiful array of photographic copies *which meets the eye at every turn. If, as Mr. Coleridge has contended, the object of the statutes was merely to

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protect engravings from being pirated by means of engraving, it is difficult to see why the legislature should have used so many and such large and comprehensive words. I am of opinion that those words are abundant to include copies effected by means of photography. Rule discharged.

GAMBART *v.* MAYNE. *May* 8.

A suggestion of perjury on the part of the defendant and his witnesses, and that fresh evidence has been discovered by the plaintiff since the expiration of the time for moving for a new trial, affords no ground for asking the court to dispense with the 50th rule of Hilary Term, 1853.

THIS was an action for the alleged infringement by the defendant, a bookseller and stationer at Exeter, of the plaintiff's copyright in an engraving of Holman Hunt's celebrated picture of "The Light of the World," by the sale of photograph copies thereof.

At the trial before Williams, J., at the first sitting at Westminster in this term, the jury declined to believe the unsupported statement of the only witness called on the part of the plaintiff to prove the sale by the defendant of a photograph copy of the plaintiff's engraving, and accordingly returned a verdict for the defendant.

Brandt, on the last day of Easter Term, moved for a new trial, on the ground of surprise. The motion was founded upon an affidavit of the plaintiff's attorney, stating, amongst other things, that, being induced by the correspondence which had taken place with the defendant before the commencement of the action, to believe [*321 that he intended to rest his defence upon his right in law to sell the copies in question, and having no reason to believe that the *fact* of the sale would be disputed, he did not conceive it to be necessary to take down more than two witnesses, but, that, when he came to the trial, he found that the transaction with one of the witnesses took place more than six months before the commencement of the action,—and suggesting perjury on the part of the defendant and his witness. There was also an affidavit of the witness who had deposed to the purchase of a copy at the trial, and who repeated his statement; and also an affidavit of a witness discovered since the trial,—a person in the employ of "the agent at Exeter for the sale of the plaintiff's engraving called 'The Light of the World,'"—who swore, that, within the last three or four months, the defendant had called his attention to a quantity of photographic copies of the engraving of "The Light of the World," and had told him he had plenty more of them for sale, and offered to sell him copies; and that he had since the month of April, 1862, and before the 21st of October, 1862, seen in the defendant's window photographic copies of the said engraving exposed for sale. The learned counsel, in answer to an intimation from the court that his motion was out of time, referred to a case of Willis *v.* Bennett, Barnes 443, the note of which is as follows:—"Belfield moved for a new trial after the four days expired, but before judgment entered on the verdict, and obtained a rule to show cause: but the court declared, that, for the future, no such motion should be received after the four days, *unless where the foundation of the motion be a fact not disclosed to the party till after that time.*"

[BYLES, J.—I believe this has never been allowed since Barnes's
*322] time, except where counsel has by mistake *moved in the wrong court, and so inadvertently let the time for moving slip by.(a)]

ERLE, C. J.—This is not res noviter ad notitiam veniens. That which is now deposed to is evidence which a little more diligence would have enabled the plaintiff's attorney to bring forward at the trial. The circumstances must be very peculiar indeed to induce me to depart from the ordinary rule.

The rest of the court concurring, Rule refused.

(a) See Johnson v. Warwick, 17 C. B. 516 (E. C. L. R. vol. 84); and see Cooper v. Lloyd, 6 C. B. N. S. 519 (E. C. L. R. vol. 95).

ZYCHLINSKI v. MALTBY and Another. *May* 8.

It is no objection to a motion for security for costs on the ground that the plaintiff (a foreigner having a very shadowy residence in this country) has assigned his interest in the result of the action,—that the fact was known to the defendant more than a year ago, and that the cause is ripe for trial.

THIS was an action for an alleged malicious prosecution of the plaintiff by the defendants.

Sir G. Honyman, on a former day in this term, obtained a rule nisi on behalf of the defendants calling upon the plaintiff to show cause why the further proceedings in this cause should not be stayed until security should be given by the plaintiff for costs,—the plaintiff being out of the jurisdiction of the court, and the cause being prosecuted solely for the benefit of third persons; and why the plaintiff or his attorney should not, within such time as the court should direct, declare in writing to the defendants' attorneys the particulars of the profession, occupation, or quality, and place of abode, of the plaintiff.

*323] *The motion was founded upon an affidavit stating in substance that the plaintiff was a foreigner and had no permanent residence within the jurisdiction of the court, and that the plaintiff's attorney had refused to give his address; that the plaintiff was the respondent in a suit in the Divorce Court wherein his wife (the daughter of the defendant Maltby) obtained an absolute divorce from him on the ground of cruelty and adultery; that the costs of that suit were taxed at 185*l.* 16*s.* 9*d.*, and had been ordered to be paid by the plaintiff, but had not been paid; that diligent search had been made for the plaintiff in the town of Nottingham (where he had been said to have been residing) and the neighbourhood, and elsewhere, but the deponent had been unable to learn or trace his residence or address; that it was believed that the action was not being carried on for the benefit of the plaintiff himself, but for the benefit of certain persons who had advanced money to the plaintiff to enable him to carry it on, by way of speculation on the result, and who stated that they expected to be repaid their advances out of the damages the plaintiff alleged he should recover against the defendants, as set forth in a letter from the plaintiff to the brother of the defendant Maltby; that one F. K., of,

&c., was one of the speculators referred to, and was the same person who had made an affidavit in answer to a summons before Blackburn, J., at Chambers, on the 24th of March last; that such affidavit was produced before Blackburn, J., on the hearing of the defendants' summons, after a week's time had been given by the learned judge to the plaintiff to answer the matters contained in the affidavit filed on the defendants' behalf on taking out such summons; that the defendants were advised that the facts deposed to in the said affidavit of the said F. K. ought to have been deposed to by the *plaintiff himself, and from the fact of the plaintiff not making such affidavit, [*324 although a week was given him for that purpose, as well as from the result of the various inquiries and searches the deponent had made and caused to be made for the plaintiff, he verily believed that he was not within the jurisdiction of this court; that the defendants had been put to most serious costs in their defence of this action, which they would have no means whatever of recovering from the plaintiff in the event of their obtaining a verdict, as he had, to the best of the deponent's knowledge, information, and belief, no property whatever nor visible means of subsistence within the jurisdiction of this court, nor in fact any permanent source of income at all; that the application was not made for the purpose of the divorce suit, but to compel the plaintiff to give security for costs in this action; and that the defendants were advised that they had a good defence to this action on the merits.

The letter above referred to, addressed to the brother of the plaintiff, was dated "Brussels, the 28th of January, 1862," and was as follows:—

"Sir,—I have the honour to address myself to you, and explain to you the position in which I find myself, and to show you all the conciliatory sentiments which I have for my wife and child, and that I think earnestly of the consequences of this long law-suit, which costs so much money, vexation, and time to both parties. I expect to return in some days to London or to Nottingham, because the last term of the law-suit is fixed for the commencement of the next month, and that I hope to finish, on account of the large sum of money it cost me.

"My fortune not permitting me to make all the advances of funds, I have been obliged to arrange that with certain persons. You know well what enormous *sums have been spent by both parties. The speculators will advance again 1000*l.* in addition to the [*325 first advances, in order to take possession of the whole. When I made this arrangement, I engaged to give up all damages and interests, as well as all the benefit that I could draw from my law-suit, to the speculators. I gave also to these gentlemen a power by which they furnish all necessary money as well as instructions to the advocates. I am much afraid, that, when the law-suit is ended in the month of February, the Maltby family will be ruined. The speculators will carry off the whole, persuaded as they are of gaining. I have taken the advice of the best advocates of London; and they have assured me that the jury will give me enormous damages and interests, because my Government has demanded satisfaction from the English Government for the outrage that I have received from the family Maltby in England; and that besides they would pay all the

expenses of the law-suit. The damages and interests will be much the greater for the wrong they have caused me, as well as for the length of the defence. When I entered upon the law-suit, I only thought of my honour, and did not foresee the length of it. Behold a year during which I have borne it, after having spent for this a sum of 1300*l.*, having been at Rome, at Paris, and in Germany! I perceive at the end of this matter that neither the Maltby family nor I have anything, and that all will be taken by the lawyers, the speculators, and justice. My wife and my daughter will have nothing; and I can do nothing for these two, because of my parents.

"I ask you, then, to explain sincerely to their counsel, that, before I return, to be present at the trial, if they desire to arrange amicably, in order to avoid the ruin of a whole family, and to put down so
*326] much *scandal, they may arrange it with me by the intermediaze of Mr. M. To avoid all reproach, I give you six days to send your answer.

"Meantime, Sir, I remain your servant,

BARON ZYCHLINSKI.

"My address, 17, Rue des Longs Chariots, Brussels."

H. James now showed cause, upon an affidavit of the plaintiff in which he stated that he was residing at Nottingham, which he intended to make his residence, and where he had resided for two years and upwards (except that he had been absent from England "by an order of Cockburn, C. J., giving him liberty to travel on the continent"), whatever might be the result of this cause; and that the sole object of the application for security for costs and for his address, was, to harass and annoy him, and to prevent the action being brought to trial if possible, and to enable the defendants to take him in execution for the costs awarded against him in the suit in the Divorce court. The learned counsel submitted, that, according to all the practice of the court, the application was too late; that all the facts now sworn to were known to the defendants when the letter of the 28th of January, 1862, was received, and yet they had allowed the plaintiff to go on preparing for trial, and incurring large costs;(*a*)
*327] and that the effect of requiring the *plaintiff now to give security would virtually be to stay the proceedings altogether.

Sir G. Honyman, in support of his rule, was stopped by the court.

ERLE, C. J.—This rule must be made absolute. The rule of practice, in ordinary cases, undoubtedly is, that security for costs must be asked for before issue joined.(*b*) But this is a case of a very extraordinary nature. The objection to the plaintiff's being allowed to proceed without giving security for costs, is, that he has sold the action, and has no longer any personal or pecuniary interest in it. His letter shows that he has conveyed away all his rights. The parties who have taken it up must give security for costs.

WILLES, J.—It is quite clear that the general rule of practice does

(*a*) In Wainwright v. Bland, 2 C. M. & R. 740, 4 Dowl. P. C. 547, Alderson, Baron, says: "Where the party does not come to the court as soon as he has a knowledge of the facts which will warrant the application, he suffers the other party to incur expenses which he might not have done if the application had been made promptly, since he might have withdrawn from the contest." And see Young v. Rishworth, 8 Ad. & E. 479, n., and Doe d. Somers v. Brood, 1 Dowl. N. S. 857.

(*b*) Reg. Gen. H. T. 1853, r. 22.

not apply to such a case as this: otherwise, plaintiffs would in many cases, directly after issue joined, assign away all their interest in the result, leaving the defendant to fight a shadow.

The rest of the court concurring Rule absolute.

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*TURNER and Another *v.* REYNALL. *April* 28. [*328

A medical practitioner is entitled to maintain an action for attendances and medicine, though not registered at the time of such attendance under the 21 & 22 Vict. c. 98: it is enough if he appears to be duly registered at the time of the trial.

And, where a business is carried on by two partners, one of whom is registered as a surgeon and apothecary, and the other as a surgeon only, this is no answer to a joint claim for attendances and medicine supplied in both capacities.

***Semble*,—per Erle, C. J.,—that it would be enough if one member of the firm only had been registered.**

THIS was an action for work and materials, money paid, and goods sold and delivered. Plea, never indebted.

The cause was tried before Byles, J., at the second sitting in London in Hilary Term last. The facts were as follows:—Turner and Smith carried on in partnership the profession of surgeons and apothecaries. Turner was a duly qualified surgeon and apothecary, and was registered as such in the year 1859, under the 21 & 22 Vict. c. 98, s. 15. Smith, who was admitted a member of the college of surgeons on the 1st of July, 1861, *but was not registered under the statute until the 29th of January*, 1863, *and then as a* "surgeon" *only*, became a member of the firm on the 29th of September, 1861. The claim in the action was for medicine and attendance from July, 1861, the attendances being, with the exception of three or four for galvanizing the defendant's wife(*a*) and syringing her ear, all attendances by both partners in the character of apothecaries. The entire claim was 59*l.* 9*s.* 6*d.*

On the part of the defendant, it was submitted, that, to entitle the plaintiffs to maintain the action, it was incumbent on them to show that they were *both* duly registered under the 21 & 22 Vict. c. 98 *at the time the attendances were given and the medicine supplied*,—the 31st section enacting that "every person registered under this act shall be entitled, according to his qualification or qualifications, to practise medicine or surgery, or medicine and surgery, as the case may be, in any part *of Her Majesty's dominions, and to demand and [*329
recover in any court of law, with full costs of suits, reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied by him to his patients;" and the 32d, that, "after the 1st day of January, 1859, no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this act:" and, further, that, one of the partners being registered as *a surgeon only* (assuming that a subsequent registration would do), it was not competent to him to join in an action for attendances and medicine supplied as an apothecary. The

(*a*) As to galvanising, see Thistleton *v.* Frewer, 31 Law J. Exch. 230.

cases of Allison v. Haydon, 4 Bingh, 619 (E. C. L. R. vol. 13), 1 M. & P. 588, 3 C. & P. 246, and Wagstaffe v. Sharpe, 3 M. & W. 521, were referred to.

On the other hand it was insisted that a registration at any time before the trial was sufficient; and that it was enough that one member of the firm was qualified by registration to act as an apothecary.

The learned judge ruled that the registration was sufficient to entitle the plaintiffs to maintain the action; and he directed the jury to find for the plaintiffs in respect of the attendances and medicine supplied since the 29th of September, 1861,—reserving leave to the defendant to move to enter a nonsuit or a verdict, if the court should think his construction of the statute erroneous; all necessary amendments and certificates to be made and given, and the defendant consenting to be bound by the decision of this court.

Petersdorff, Serjt., and *Garth*, now showed cause.—The case of
*330] Haffield v. Mackenzie, 10 Irish Common *Law Rep. 289, is a distinct authority to show that the 32d section of the 21 & 22 Vict. c. 98 is complied with by proof that the plaintiff is a duly registered medical practitioner at the time of the trial. In Wright v. Greenroyd, 1 Best & Smith 758 (E. C. L. R. vol. 101), it was held that that section had not a retrospective operation. And the like was held in Thistleton v. Frewer, 31 Law J. Exch. 230. Consequently, —the date mentioned in the 32d section of the 21 & 22 Vict. c. 98 being by the 23 & 24 Vict. c. 7 extended to the 1st of January, 1861, —the plaintiffs must in any event be entitled to recover in respect of all charges anterior to that date. The main question, however, is, whether Turner being registered as an apothecary, and Smith as a surgeon only, they can properly join in an action to recover for attendances and medicine supplied in the former character. [BYLES, J.—If they cannot, no surgeon and apothecary can carry on business in partnership at all. WILLES, J.—Brokers cannot act in the city of London unless duly admitted: Cope v. Rowlands, 2 M. & W. 159. Suppose one member of a firm is admitted as a broker, could the firm sue for brokerage fees?(a)] The 32d section merely says that the party shall be registered, but does not say how. [BYLES, J.—Are there any penal consequences attached to non-registration, beyond the inability to sue?] By s. 36 an unregistered medical man is disqualified from holding "any appointment as a physician, surgeon or other medical officer either in the military or naval service, or in emigrant
*331] or other vessels, or in any hospital, *infirmary, dispensary, or lying-in hospital, not supported wholly by voluntary contributions, or in any lunatic asylum, gaol, penitentiary, house of correction, house of industry, parochial or union workhouse or poorhouse, parish union, or other public establishment, body, or institution, or to any friendly or other society for affording mutual relief in sickness, infirmity, or old age, or as a medical officer of health." These are the only consequences.

David Keane and *Cole*, in support of the rule.—The court will hardly

(a) In the case of a broker, there is no legislative provision prohibiting him from forming a partnership with an unqualified person, as there is with respect to attorneys: see 6 & 7 Vict. c. 73, s. 32, and the case of Tench v. Roberts, 6 Madd. 145, a decision upon the 11th section of the repealed statute 22 G. 2, c. 46.

give its adhesion to the decision of the Irish Exchequer in the case of Haffield *v.* Mackenzie. The whole policy of the statute evidently was, to secure the proper line of demarcation between the three branches of the medical profession, and that none should intrude into its practice but such as are properly qualified. [KEATING, J.—The preamble shows that the main intention was, to enable persons requiring medical aid to distinguish between qualified and unqualified practitioners generally.] The 40th section enacts that "any person who shall wilfully and falsely pretend to be, or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under this act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine or surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding 20*l.*"(*a*) Reading that section with the preamble and the 32d section, it is plain that the object of the statute was to enable the patient, and not the judge and jury at the trial, to see whether or not *the party proposing [*332 to attend him is duly qualified, and what the nature of his qualification is. If the mere production of a certificate at the trial be sufficient to entitle the plaintiff to recover, an unqualified person might go on for six years, and then sue for his attendances in the meantime. The 15th section shows that the registration is to be in respect of a particular qualification. And by s. 31 the party is to be entitled to practise "according to his qualification." Can two men, one of whom is only qualified to act as an apothecary, and the other only as a surgeon, each enable himself virtually to practise in both capacities, by uniting themselves in partnership? [BYLES, J.—How is this bill to be recovered? Must they wait until both are dead, and then let the executor of the survivor sue? Or, suppose Smith had become bankrupt, and his assignees and Turner sued,—the one who had sinned against the statute being got rid of, would that be an ill-constituted action? WILLES, J.—Or, suppose Smith, who is registered as a surgeon only, were the survivor,—could his persopal representative sue for charges for attendances as an apothecary?] If the defendant's argument is well founded, Turner might have brought the action alone. [BYLES, J.—I must confess I see nothing in the statute to make it illegal for two parties in this position to agree to join in partnership, the one giving his attention to the general practice, the other to the surgical cases.] The want of a certificate under the Apothecaries Act, 55 G. 3, c. 194, was always ground of nonsuit, and need not have been pleaded specially: Morgan *v.* Ruddock, 4 Dowl. P. C. 113; Shearwood *v.* Hay, and Wills *v.* Langridge, 5 Ad. & E. 383 (E. C. L. R. vol. 31), 6 N. & M. 831; Wagstaffe *v.* Sharpe, 3 M. & W. 521. The words of the 55 G. 3, c. 194, s. 21, were, that "no apothecary shall be allowed to recover any charges claimed by him in any court of law, unless such apothecary shall *prove at the [*333 trial that he was in practice as an apothecary prior to the 5th of August, 1815, or that he has obtained a certificate to practise as an apothecary from the master, wardens, and society of apothecaries."

(*a*) See Pedgriff, App., Chevallier, Resp., 8 C. B. N. S. 240 (E. C. L. R. vol. 98).

There is no substantial difference between the language of that statute and that of the statute now under consideration. [ERLE, C. J.—The only doubt I ever remember to have heard, was, whether the certificate (under the old act) must be obtained before action brought. I recollect once sending up from an assize town for a certificate.] If a certificate obtained at any time before the trial was sufficient, the argument about the necessity of pleading the want of a certificate would be idle and absurd. To entitle a party to maintain an action upon a contract, it is essential that the contract should be a lawful one at the time it is entered into.

ERLE, C. J.—This is an action brought by Turner and Smith, medical practitioners, against a patient, for attendances and medicine commencing in September, 1861. Now, it is clear that the defendant had the consideration; and he seeks to defeat the claim by reason of the 32d section of the 21 & 22 Vict. c. 98, which enacts, that, "after the 1st of January, 1859" (altered by a subsequent statute to the 1st of January, 1861), "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, *unless he shall prove upon the trial that he is registered under this act.*" At the trial it was proved that Turner was duly registered under the act as a surgeon and apothecary in the year 1859; and it was also proved that Smith was
*334] registered as a surgeon, but only on the day before the trial. *Both, therefore, had strictly complied with the words of the act, and both according to the distinct judgment of the Court of Exchequer in Ireland in the case of Haffield *v.* Mackenzie, 10 Irish Common Law Rep. 289, to which I entirely accede, were entitled to sue. But, even if Smith had not been registered at all, I should not, as at present advised, have felt disposed to yield to the argument urged on the part of the defendant. The intention of the act was, as the preamble states, to enable persons requiring medical aid to distinguish between qualified and unqualified practitioners. Here, Turner was from the beginning duly qualified as a registered surgeon and apothecary, and therefore the patients of the firm of which he was the head had all the security the act intended to give them. How can it matter to the patient whether the attendance is given and the medicine dispensed by an assistant under the supervision of his master, or by one who calls himself a partner and takes a share of the profits? Here, both partners were thoroughly qualified, and both were registered. This is a mere stamp objection; and, construing the statute according to its strict words, I am of opinion that it ought not to prevail.

WILLES, J.—I am of the same opinion. Two questions are presented here,—first, whether there is anything illegal in a partnership between a qualified and an unqualified medical practitioner,—secondly, whether the statute has been complied with. Is there anything illegal in A., a surgeon, and B., a surgeon and apothecary, engaging with C., a patient, that one shall attend him in his capacity of surgeon and the other in his capacity of apothecary, and that they shall be remunerated for their several services by a joint payment to the two? I find nothing in the statute to render such a transaction illegal, each

being a duly-qualified *practitioner within the statute. That being so, I entirely coincide with my Lord in the opinion he has expressed, that the requirements of the statute have in this case been duly complied with, and that the rule must be discharged. [*335

BYLES, J.—I am of the same opinion. Looking at the very words of the 32d section of the statute, it seems to me that all that was necessary for the plaintiffs to do, was, to prove at the trial that they were then registered under the act. The words are,—"unless he shall prove upon the trial that he *is* registered under this act." All the party has to prove, is, that he is registered before he gets a verdict. Independently of the case of Haffield *v.* Mackenzie, I should have thought, and I did at the trial think, there was very little in the objection; but, after that case, I cannot entertain the smallest doubt. As to the other objection, that the one partner was registered under the act as a surgeon and apothecary, and the other as a surgeon only, —it comes to this, that, where two medical men carry on their profession in partnership, one being registered as a surgeon, and the other as an apothecary, no part of a claim for their services can be recovered in a court of law during the life of either. That is so unreasonable a conclusion that I should require very strong words to induce me to arrive at it. This is a disqualifying statute, and therefore is to be construed strictly.

KEATING, J., concurred. Rule discharged.

*SILLEN *v.* HOLLOWAY. *May* 7. [*336

Where, in an action upon an agreement the plaintiff obtained a verdict, and a rule was afterwards made absolute to enter a *verdict for the defendant*,—the court, under special circumstances, allowed the rule to be amended by directing a *nonsuit* to be entered, but only upon the terms of the plaintiff paying the costs of the former action and of the rule.

THIS was an action brought by the plaintiff to recover the sum of 500*l.* under an agreement dated the 7th of November, 1860, for procuring for the defendant a patent for the sale of "Holloway's Ointment" in France and her colonies.

At the trial the plaintiff obtained a verdict for the sum claimed. The defendant afterwards obtained a rule nisi to enter the verdict for him, on the ground that the patent which the plaintiff had obtained had been allowed to expire by reason of certain annual payments for keeping the patent on foot not having been made at the times required by the laws of France. That rule was made absolute in Hilary Term last, on the ground that the patent had expired and become void and useless to the defendant.

Brandt, on a former day in this term,—upon an affidavit that the payments had since been duly made by the plaintiff, and that the patent so obtained by him in France was now in full force and effect and ready to be assigned to the defendant,—obtained a rule nisi to amend the former rule by making it absolute to enter a nonsuit instead of a verdict for the defendant.

Bovill, Q. C., showed cause, upon affidavits showing that the supposed patent was not the thing bargained for, and moreover was void

by the law of France, that the costs of the action remained unpaid, and that the plaintiff was insolvent and not to be found.

*337] ERLE, C. J.—I think the rule should be made *absolute to enter a nonsuit instead of a verdict: but it must be upon the terms of the plaintiff paying the costs of the action and of this rule.

WILLES, J.—The case of a second ejectment is provided for by the 93d section of the Common Law Proceedure Act, 1854, 17 & 18 Vict. c. 125. Other actions depend upon the general practice of the court.

KEATING, J., concurred. Rule absolute accordingly.

STEER v. CROWLEY and Another. *May* 5.

A release to the surviving partners in a firm by the executors of a deceased partner, of all the freehold, copyhold, and leasehold property held by the firm, expressing no consideration for the conveyance upon the face of it,—Held, to be sufficiently stamped with a common deed stamp.

By the conditions of sale of leasehold property, it was provided, amongst other things, that an abstract of the title of the vendors should be delivered to the purchaser on the tenth day after the sale; and that, "if any requisition on or objection to the title of any lot be made, whether arising out of the abstract furnished or otherwise, which the vendors may be unable or unwilling to remove or comply with, it shall be in the option of the vendors, by notice in writing to be given to the purchaser, to rescind the contract, unless such purchaser shall, within ten days after such notice shall have been given, waive such objection or requisition; and, in case such purchaser shall not, within ten days after such notice shall have been given, waive such objection or requisition, the deposit-money shall thereupon be returned to such purchaser, but without any interest, costs, or expenses."

The abstract delivered showed the title to be in the vendors jointly with the executors of a deceased partner. The purchaser thereupon required that the executors should join in the conveyance. It was afterwards discovered that two years before the executors had released to the vendors all their interest in the property of the firm, and the purchaser was furnished with a further abstract of that deed. Conceiving that deed to be insufficiently stamped, the purchaser still required that the executors should be conveying parties. This they refused; and thereupon the vendors gave the purchaser notice, under the above condition, that they elected to rescind the contract, and offered to return the deposit-money.

In an action against the vendors for not delivering a proper abstract,—the deposit having been paid into court,—Held, that the purchaser was entitled to recover for the breach of contract, but only, under the circumstances, to nominal damages.

THIS was an action brought by the plaintiff, the purchaser, against the defendants, the vendors, of a beer-shop and other premises sold by auction, for an alleged breach of the conditions of sale, and to recover the deposit paid on the sale.

*338] *The first count of the declaration stated that the defendants theretofore, to wit, on the 4th of June, 1862, put up to sale by public auction certain tenements and premises, with the appurtenances, in four lots, and amongst others Lot 2, described as a freehold estate called The Nag's Head beer-house, and Lot 3, described as an adjoining freehold cottage, upon and subject to the following conditions, that is to say,—1. The highest bidder shall be the buyer; and, if any dispute arise as to the last or best bidder, the lot in dispute shall be put up at a former bidding,—2. No person shall advance less at any bidding than 5*l.*, nor retract his or her bidding,—3. Each purchaser shall immediately after the sale pay down a deposit of 20*l.* per cent. upon the amount of his or her bidding, and sign an agreement for payment of the remainder to the vendors on the 11th day of August next, at the office of the vendors' solicitors, Messrs. Drum-

monds, Robinson & Till, of Croydon; at which time and place the purchases are to be completed, and the purchasers, having paid their purchase-money, shall then be entitled to possession of their respective lots, all outgoings having reference to periods before that time being cleared by the vendors: and if, from any cause whatever, the purchase of any lot should not be completed on that day, the purchaser shall pay interest on the remainder of his or her purchase-money after the rate of 5*l.* per cent. per annum from that day to the day of payment,—4. On the 10th day after the sale, the vendors will at their own expense deliver to each purchaser, on his applying, by himself or by his solicitor or agent at the office of the vendors' said solicitors, between the hours of 10 a. m. and 6 p. m., such abstract of title as is hereinafter provided for; but the purchaser of several lots shall not be entitled to more than one abstract, except at his or her own expense,—*5. All objections or requisitions, not precluded by these conditions, in respect of the titles or any or either of them, shall [*339 be stated in writing, and delivered to the vendors' said solicitors within fourteen days after the day on which the abstracts are to be ready for delivery; otherwise, and subject thereto, the title is to be considered accepted, although a perfect abstract may not have been delivered; and all objections or requisitions in respect of the title which may be shown by any further abstract which may be delivered in compliance with the requisition of any purchaser, and also all objections or requisitions in respect of any reply to the vendors' solicitors to any objection or requisition in respect of the title or otherwise, shall be stated in writing and delivered to the vendors' said solicitors within the like period of fourteen days after the delivery of such further abstract or of any such reply, as the case may be; otherwise, and subject thereto, the title shown by such further abstract shall be considered accepted, and such reply shall be considered satisfactory; and, in respect of this present condition, time shall be of the essence of the contract,—6. If any requisition on or objection to the title of any lot be made, whether arising out of the abstract furnished, or otherwise, which the vendors may be unable or unwilling to remove or comply with, it shall be in the option of the vendors, by notice in writing to be given to the purchaser or left at his or her last-known place or places of abode or business in England, or left at the office of his or her solicitor, to rescind the contract, notwithstanding any effort which may have been made to remove any such objection or to comply with such requisition, and notwithstanding any negotiation which may have taken place relating thereto, unless such purchaser shall within ten days after any such notice shall have been given or left as *aforesaid waive such objection or requisition; and, in [*340 case such purchaser shall not within ten days after any such notice shall have been given or left as aforesaid waive such objection or requisition, the deposit-money shall thereupon be returned to such purchaser, but without any interest, costs, or expenses,—7. All attested, official, certified, or other copies of or extracts from any deeds, wills, registers, or other documents or evidence whatsoever, and all statutory declarations which can and shall be required, are respectively to be made and procured at the purchaser's expense; and the produc-

tion of any deeds, wills, registers, or other documents or evidence not in the vendors' possession, which may be required for verifying the abstract, or for any other purpose, is also to be procured by and at the expense of the purchaser,—8. No land-tax is paid by the vendors in respect of either lot; and it is believed that the land-tax thereon has been redeemed; but the vendors have not any evidence of the fact in their possession: it is stipulated that no evidence shall be required of the redemption of the land-tax, and that no objection to the title shall be made for want of such evidence,—9. The descriptions, quantities, and dimensions of the lots set forth in these particulars and conditions are believed and shall be taken as correct; but the sale of any lot or lots shall not be annulled or rendered void or voidable, nor shall any compensation be required, in case any inaccuracy or omission should be discovered therein; and no evidence of the identity of any lots with the descriptions in any of the abstracted documents shall be required, further than the documents themselves afford,—10. The freehold portion of Lot 1 (coloured brown on plan No. 1) was, with other portions of The Waldrons, sold in lots by public auction in September, 1847: the vendors shall furnish an abstract of title com-
*341] mencing with the conveyance *to the purchaser at such sale, and which conveyance is dated the 31st of January, 1848; and the earlier title shall not be required, investigated, or objected to; and on the completion of the purchase, the earlier abstract in the possession of the vendors shall be delivered to the purchaser,—11. As to the leasehold portion of Lot 1 (coloured blue and yellow on plan No. 1), the title shall consist of the lease thereof granted to the present vendors by indenture dated the 23d of May, 1853; and the lessor's title shall not be required, investigated, or objected to: as to lots 2 and 3 (coloured pink and green on plan No. 2), the title shall commence with indentures of lease and release dated respectively the 12th and 13th of May, 1812; and the earlier title shall not be required, investigated, or objected to,—13. The purchaser of the largest part in value of property held under one title shall be entitled, after the completion of the sale of all such property, to the custody of the muniments of title in the possession of the vendors comprising the same, and shall, at the expense of the respective purchasers of other parts of the same property requiring the same, enter into usual covenants with them respectively for the production and furnishing copies of such muniments, with the usual proviso for cesser on the covenantor's parting with the said muniments and delivering gratis a substituted covenant. If any part of such property shall not be sold at this sale, the vendors shall retain the said muniments, and shall at the expense of the parties requiring the same, enter into covenants for their production and for furnishing copies thereof, with the above-mentioned proviso as to cesser,—14. As to Lot 4 (coloured yellow on plan No. 2), the title shall commence with an indenture of feoffment dated the 28th of March, 1808, and the earlier title shall not be required, inves-
*342] tigated, or objected to; and no objection *or requisition shall be made on the ground that any covenant for production of documents of title may be deemed not to run with the land,—Lastly, if any purchaser or purchasers shall fail to comply with the above

conditions, his, her, or their deposit shall thereupon be forfeited, and the vendors shall be at liberty to re-sell the property at such time, and in such manner, and subject to such conditions as they shall think fit; and any deficiency in price which may happen on and all expenses attending the re-sale shall immediately afterwards be paid by the defaulter to the vendors, and, in case of non-payment, shall be recovered by the vendors as liquidated damages: Averment, that the plaintiff, on such exposure to sale, became and was the highest bidder for and purchaser of the said lots 2 and 3, upon and according to the said conditions, for certain prices, to wit, 170*l.* for Lot 2, and 75*l.* for Lot 3, and then paid to the defendants a large sum of money, to wit, the sum of 49*l.*, as a deposit of 20*l.* per cent. in part of the said purchase-money; and that thereupon, in consideration that the plaintiff, at the request of the defendants, then promised the defendants to perform all things in the said conditions of sale contained on the said plaintiff's part as the purchaser of the said lots 2 and 3 at the sum of 245*l.* to be performed, the defendants promised the plaintiff to perform all things in the said conditions of sale contained on the vendors' part in that behalf to be performed; and that, although the plaintiff did all things necessary on his part to entitle him to sue the defendants for the breaches of contract thereinafter mentioned, and all necessary times in that behalf had elapsed, yet the defendants did not nor would deliver to the plaintiff such abstract of title as was by the said conditions in that behalf provided for, *nor had they such title [*343
to the said lots as was required by the said conditions, nor were they able to complete the said purchase on their part according to the said conditions; by reason whereof the plaintiff had been deprived of all the benefits and advantages which would have arisen to him from the completion of the said purchase, and had been put to great expenses in bidding for the said lots, and in investigating and endeavouring to procure such title as aforesaid, and to get the said purchase completed, and had lost gains and profits and interests which he might and otherwise would have made and acquired from using and employing the said sums of money so paid as a deposit and as commission for bidding for the said lots as aforesaid, and other moneys provided and kept by him the plaintiff for the completion of the purchase.

There were also the usual counts for money received, interest, and money due on accounts stated.

Pleas,—first, to the first count, that the defendants did not promise as alleged,—secondly, to the first count, that the plaintiff did not become nor was he the highest bidder for and purchaser of the said lots as alleged,—thirdly, to the first count, that the plaintiff did not pay to the defendants the said sum as a deposit as alleged,—fourthly, to the first count so far as it related to the defendants' not having delivered to the plaintiff the said abstract of title, that the defendants did deliver to the plaintiff such abstract of title as was by the said conditions in that behalf provided for, and according to their said promise,—fifthly, to the first count so far as it related to the defendants' not having had such title to the said lots as was required by the said conditions, and to their not being able to complete the said purchase

on their part, according to the said conditions, that they the defend-
*344] ants did have such *title to the said lots as was required by the said conditions, and that they were able to complete the said purchase on their part according to the said conditions,—sixthly, to the first count, that the defendants did after the said sale deliver and furnish to the plaintiff, according to the said conditions, an abstract, and also a further abstract, as and for abstracts by the said conditions provided or required to be delivered and furnished as aforesaid, and the plaintiff made a requisition on and objection to the title to the said lots, which the defendants being unable or unwilling to comply with, the defendants did, before action, by notice in writing given to the plaintiff according to the said conditions, give notice that they elected to and would rescind the said contract according to the said conditions, unless the plaintiff would within ten days after the said notice so given waive the said requisition; that the plaintiff did not within ten days after the said notice was so given waive the said requisition; and that thereupon the said contract became and was rescinded,—seventhly, to the last count, except as to the sum of 49*l.*, parcel of the money claimed in respect of the matters therein alleged, never indebted,—eighthly, as to the said 49*l.*, parcel, &c., payment of that sum into court.

The cause was tried before Erle, C. J., at the sittings in London, after last Hilary Term, when the following facts were proved or admitted:—The defendants put up the premises in question to sale by auction on the 14th of June, 1862, under the particulars and conditions of sale set out in the declaration. At the auction, one Robert Rogers, who bid for the plaintiff, was the highest bidder for lots 2 and 3, and became the purchaser. He paid for the plaintiff a deposit of 49*l.*, and he signed a contract of which the following is a copy:—

	£	s.	d.
"Lot 2.	170	0	0
3.	75	0	0
	£245	0	0

*Memorandum, this 14th day of June, 1862, that I the undersigned Robert Rogers, of, &c., [*345 declare myself to be the purchaser of Lots 2 and 3 specified in these particulars, at the sum of 245*l.*, and having paid the sum of 49*l.* as a deposit, do hereby agree to complete my purchase according to these particulars and conditions. And I the undersigned auctioneer, as agent for the vendors, hereby acknowledge the said payment, and agree to the terms of the above contract.

"Total purchase-money . . 245*l.*
"Deposit thereon . . . . 49*l.*
"Unpaid purchase-money . 196*l.*"

"ROBERT ROGERS.
"W. S. BLAKE."

On the 24th of June, 1862, an abstract of the defendants' title was delivered by Messrs. Drummond & Co., of Croydon, the defendants' solicitors, to Mr. H. Parry, of Croydon, the plaintiff's solicitor. This abstract showed that Henry Crowley, formerly a partner with the vendors and jointly interested with them in the property, had died leaving a will whereby certain persons were appointed executors. On the 3d of July, Mr. Parry, for the plaintiff, delivered to Messrs. Drummond requisitions on the title, to which they on the same day

delivered answers to Mr. Parry.(a) No draft *of any convey- [*346
ance was prepared and sent to the defendants' solicitors.

On the 13th of August, the defendants' solicitors delivered to Mr. Parry a further abstract, with a letter, as follows:—

"12th August, 1862.

"*Crowley's sale.*

"Dear Sir,—We find that the executors of the late Mr. Henry Crowley have released to the two surviving partners all their claim on this and other property. Messrs. Abraham Crowley and Charles S. Crowley will *therefore be the only conveying parties. We [*347
did not know when we sent you their abstract that this release had been executed; but it has just been sent to us by Messrs. Crowley. We send you an abstract of this deed of release, and you can see the original whenever you please to call. We shall be glad to receive the draft conveyance."

The following letters then passed between the respective solicitors of the parties:—

"13th August, 1862.

"*Steer and Crowley and others.*

"Dear Sirs,—In consequence of your refusal to furnish me with a full abstract of title of the will of the late Henry Crowley, deceased, or to produce the probate of the will, which by the 7th condition I consider you were bound to do, the same being in some of the vendors' possession, it has caused some delay in getting the draft settled by my conveyancer, and which I only received yesterday, prepared according to the first abstract delivered.

"I am in receipt of the further abstract. It will therefore be necessary for me to place same before my conveyancer, and incur further expense, which my client ought not to have been put to; and, as part of the money was obtained on mortgage, there will be the proposed

(a) These requisitions were as follows:—

"*Steer and Crowley and others.*

"1. The purchaser will require the vendors to furnish him at their expense with a statutory declaration that the person who executed the abstracted deeds of May, 1831, and October, 1834, by the signature 'James Parfitt' was the same person as 'James Parfitt' to whom the property was conveyed by the abstracted deeds of May, 1812.

"2. The will and codicils of Henry Crowley must be fully abstracted for the purchaser, to show that the testator's share in the property sold was not specifically bequeathed, but vested in his executors as such, and also that the last codicil did not affect the appointment of executors.

"3. The vendors must state in whose possession the probate of Henry Crowley's will is.

"4. The deeds abstracted must be delivered to the purchaser on completion.

"5. The vendors must state who are the present copartners in the firm of Crowley & Co.

"6. Are the vendors aware of any deed or matter affecting the title, and not disclosed by the abstract?"

To these requisitions the vendors' solicitors sent the following answers:—

"1. There is no doubt of the identity; but the vendors are not acquainted with any one who can make this declaration, and therefore they must under the 6th condition decline to take any trouble about it.

"2. This will is sufficiently abstracted to show who are the executors, which ordinarily would be sufficient for a purchaser, even if the testator's share had been specifically bequeathed, which, however, is not the case. Doctors Commons is the proper place for the purchaser to examine the will and codicils: but the drafts were shown by us for his solicitor's convenience, and they may be seen again if desired; but the vendors decline to deliver any further abstract.

"3. In the hands of the executors.

"4. Yes.

"5. Abraham Crowley and Charles Sedgfield Crowley.

"6. Not that we are aware of."

mortgagee's further charges for him to pay. I therefore think that I must ask your clients for the expenses my client will be put to in consequence of the defective abstract delivered. I will send the draft as soon as I receive it from my conveyancer. H. PARRY."

"22d August, 1862.

"*Crowleys and Steer.*

"Dear Sir,—We have mentioned to Messrs. Crowley the subject of
*348] your claim for expenses incurred by Mr. *Steer; and they are quite willing that we should make any compensation which we think proper. We are, however, at a loss to see how your client can have incurred *great* expense in consequence of the additional abstract sent, and which abstract only shows that the executors of Henry Crowley, deceased, have already released, thus rendering the concurrence of these executors unnecessary in the conveyance to Mr. Steer.

"We again urge your sending the draft conveyance; and this you cannot properly delay, as (independent of Messrs. Crowley being willing to pay anything reasonable in the shape of costs), if your client has a legal claim for costs in consequence of the slight accident of the abstract of the release not having been sent with the first abstract, he can of course enforce his claim, notwithstanding the sending of the draft conveyance for our perusal.

'DRUMMONDS, ROBINSON & TILL."

"24th September, 1862.

"*Crowleys and Steer.*

"Dear Sir,—We are much surprised at the continued delay herein. Messrs. Crowley will of course claim interest; but that is not a sufficient recompense for the annoyance they are being put to by the non-completion of this small purchase. We shall be obliged by your sending the draft conveyance without more delay.

"DRUMMONDS, ROBINSON & TILL."

"26th September, 1862.

"*Steer and Crowley and Others.*

"Dear Sirs,—Herewith I send you further requisitions on title. I am sorry any delay should have taken place; but the delivery of the second abstract has been the cause of it. H. PARRY."

*349] *On the 26th of September, 1862, Mr. Parry delivered to the defendants' solicitors, with the letter of the same date, the following further requisitions,—

"1. The will of Henry Crowley, deceased, must be fully abstracted by the vendors' solicitors, and delivered to the purchaser:

"2. The deed of the 14th June, 1860, ought to have stated the amount of the consideration actually given to the executors of Henry Crowley, deceased, for their testator's share in the freehold, copyhold, and leasehold estates of the late copartnership, and such deed ought to have been impressed with an ad valorem stamp for the amount of such consideration; and it is quite immaterial that the deed purports to be a release to the surviving partners instead of a conveyance, it being clearly a sale of the share of one copartner to two others who have survived him. The purchaser, therefore cannot take his con-

veyance from the surviving partners only; but the executors of Henry Crowley, deceased, must join the conveyance:

"3. The vendors must pay to the purchaser or allow him to retain the extra costs he has been or may be put to by reason of the non-delivery of the further abstract in proper time."

To these requisitions the defendants' solicitors returned the following answers:—

"1. We have abstracted all that is necessary to the title: but Mr. Parry may make any further extracts that he pleases at our office, or, to facilitate matters, we will deliver a copy at stationer's charges:

"2. The following is the opinion of Mr. Davidson, the eminent conveyancer, who advised other purchasers on this point,—'I am of opinion that the foregoing deed required and was properly stamped with a 35*s.* stamp, and the necessary progressive stamps, if any.' In consultation with him, he explained his *reasons, namely, that [*350
the defective stamping of a deed does not prevent the deed from operating, but is simply a bar to its production in court without the penalty; and, as the deed in question did not set forth any consideration, it could not be stamped with an ad valorem stamp, and therefore the deed is capable of being produced in any court without a penalty. It is therefore a good title-deed as far as the purchaser is concerned, and whether purchase-money should have been expressed, and an ad valorem stamp impressed, is a personal matter between Government and Messrs. Crowley, or between Government and the solicitor who prepared the deed:

"3. When Mr Parry mentions what these are, we will submit the matter to Messrs. Crowley."

The defendants' solicitors had requested the executors of Henry Crowley, deceased. to join in the conveyance to the plaintiff; but they refused to do so, on the ground that they had released all their interest by the abstracted deed of June 14, 1860.

On the 11th of October, the following letter was delivered to the defendants' solicitors by Mr. Parry:

"*Steer and Crowley and others.*

"Dear Sirs,—I have had a consultation with my conveyancer, Mr. Bilton, on your replies to further requisitions sent you on the 26th September last; and he still advises that the executors of Mr. Henry Crowley, deceased, must join in the conveyance to the purchaser. He suggests a consultation with Mr. Davidson, which, if you think advisable, I should consent to. I send you a copy of Mr. Bilton's opinion on the other side.(*a*) "H. PARRY.

*"P. S. By the first abstract the executors of Henry Crow- [*351
ley were clearly shown to be necessary parties to the conveyance."

(*a*) The opinion, so far as this point is concerned, was as follows:—

"I am of opinion that the deed of the 14th of June, 1860, ought to have stated the amount of the consideration actually given to the executors of Henry Crowley, deceased, for their testator's share in the freehold, copyhold, and leasehold estates of the late copartnership firm; and that such deed ought to have been impressed with an ad valorem stamp for the amount of such consideration: and it is in my opinion quite immaterial that the deed purports to be a release to the surviving partners, instead of a conveyance,—it being clearly a sale of the share of one copartner to two others who have survived him. I cannot therefore advise the purchaser to take his conveyance from the surviving partners only, but that the executors of Henry Crowley, deceased, must join in the conveyance."

On the 17th of November, a notice to rescind the contract, signed by the defendants, was served by the defendants' solicitors on Rogers, on the plaintiff, and on his solicitor, of which the following is a copy:—

"To Mr. Henry Parry, Mr. Robert Steer, Mr. Robert Rogers, and whom else it may concern.

"We the undersigned, Abraham Crowley and Charles Sedgefield Crowley, the vendors of the property comprised in Lots 2 and 3 in the particulars of a sale by Messrs. Blake at the Ship inn, Croydon, Surrey, on the 14th of June last, do hereby give you notice, under the sixth condition of the said sale, that we are unwilling to remove or comply with the requisition which has been made, that the executors of the late Mr. Henry Crowley shall concur in the conveyance of those lots; and that, unless the purchaser shall within ten days after this notice shall have been given waive such requisition, the contract with the purchaser will thereupon be rescinded, and the deposit-money will be returned to the purchaser without any interest, costs, or expenses. Dated," &c.

*352] *The following letters afterwards passed between the respective solicitors:—

"18th November, 1862.

"*Steer and Crowley and others.*

"Dear Sirs,—I have received the notices herein served by you, stating that the vendors are unwilling to remove or comply with the requisition which has been made, that the executors of the late Mr. Henry Crowley shall concur in the conveyance of the lots purchased by my client, and which notice is given under the sixth condition of sale.

"The requisition was first made on behalf of the purchaser on the 3d of July last, that the executors should join, and indeed the abstract delivered at that time clearly showed the title in the executors.

"Upon the receipt of the second abstract, further requisitions were delivered, also requiring the executors to join, on the 26th of September last, and no positive refusal that they should do so has been notified to the purchaser or his solicitor.

"The delay caused by the vendors in the first place, by not delivering a proper abstract according to the conditions, and, in the next, by not giving the notices which were served on the 17th of November, instant, has been a serious loss and expense to my client; and he is advised, under the circumstances attending the sale and purchase, that the vendors have no right to avail themselves of the sixth condition of sale, but are bound to get the proper parties to concur in the conveyance. Unless, therefore, the whole expenses and losses my client has sustained in the matter are paid, I am instructed to take proceedings to enforce a specific performance of the agreement: and, unless I hear from you that your clients will pay the same in the course of this week, I shall file a bill for that purpose. I think it a very strange

*353] proceeding that the first *abstract delivered clearly showed the title in the executors, and by which they must have joined, that the vendors should now refuse to obtain their concurrence.

"H. PARRY."

"18th November, 1862.

"*Crowley's sale.*

'Dear Sir,—The vendors are unable to procure the concurrence of the executors of the late Henry Crowley. The executors decline to join. Their solicitors, as well as the vendors' counsel, advise that their concurrence is not necessary for the purchaser's title.

"We answered your last requisitions on the title on the 26th of September; and we did not hear from you again on the subject till the 11th of October; since which time we have been unable to obtain the concurrence which you insisted on. And we have, therefore, no alternative but to act under the conditions.

"It is open to your client to complete, as other purchasers have done, without insisting on this impracticable requisition; in which case, as we have already told you, we should submit to Messrs. Crowley the expenses which you say were occasioned to you by the entire abstract not having been delivered at once. These expenses must have been very trifling; but still it was our intention to have submitted to Messrs. Crowley any reasonable demand respecting them.

"After the ten days mentioned in the notice, we shall return the deposit, and the contract will be rescinded.

"DRUMMONDS, ROBINSON & TILL."

"1st December, 1862.

"Dear Sirs,—As your clients refuse to execute a proper conveyance to my client, I have received instructions to take legal proceedings to recover the *deposit, interest, and damages for the breach of the agreement. Will you accept service of the writ? I enclose same. [*354

"H. PARRY."

The writ was issued on the 1st of December, 1862. The deposit of 49*l.* was paid into court with the plea.

On the part of the plaintiff it was submitted that the defendants had failed to deliver an abstract in compliance with the conditions of sale; and that, the deed of release of the 14th of June, 1860, being stamped with a common deed-stamp of 35*s.*, instead of an ad valorem duty on the amount of the consideration, was void, and consequently that the purchaser was entitled to insist upon their joining in the conveyance.

For the defendants, it was insisted that the deed of release was sufficiently stamped, no consideration being expressed on the face of it; and that they were justified, on the plaintiff's insisting on a requisition they could not comply with, in rescinding the contract under the sixth condition.

The Lord Chief Justice directed a verdict to be entered generally for the plaintiff, with leave to the defendants to move to enter the verdict for them, or a nonsuit; and it was agreed, that, in the event of the court holding that the plaintiff was entitled to recover, they should say upon what principle the damages should be assessed.

Bovill, Q. C., on a former day in this term obtained a rule nisi accordingly, on the grounds,—"first, that the release by the executors of Henry Crowley was sufficiently and properly stamped, and that the plaintiff was not entitled to require the executors to join in the conveyance,—secondly, that, as the executors refused to join, the de-

*355] fendants were entitled to rescind the *contract, and the plaintiff was not entitled to recover his expenses or interest on his deposit,—thirdly, that the plaintiff was not entitled to recover his expenses up to the time when the abstract of the release was delivered, viz., the 12th of August, or interest on his deposit;" or to reduce the damages to nominal damages with respect to the abstract of the release not having been delivered until the 12th of August, if the plaintiff was entitled to recover on that part of the case, no damages having been sustained in respect of that matter. He submitted that no ad valorem stamp was necessary on the release from the executors of the late Henry Crowley, no consideration being *expressed* therein to have been paid,—55 G. 3, c. 184, Sched. *Conveyance;* 13 & 14 Vict. c. 97, ss. 1, 2, and Sched. *Conveyance;* Doe d. Kettle *v.* Lewis, 10 B. & C. 673 (E. C. L. R. vol. 21); Tilsley's Stamp Laws 227; and that, the purchaser refusing to dispense with a conveyance by the executors, the vendors were entitled, under the 6th condition, to rescind the sale and return the deposit without interest or costs.

Parry, Serjt., and *Joyce*, now showed cause.—The sale in question took place on the 14th of June. On the 24th an abstract was delivered, which, though on the face of it it did not show a defective title, turned out not to be a perfect abstract. On the 13th of August, after some expense incurred, a further abstract is delivered showing a release by the executors and executrix of Henry Crowley's will of all their interest in the property to the surviving partners. The vendors, therefore, failed to comply with the 4th condition, under which they were bound to deliver a perfect abstract within ten days after the sale. Notwithstanding the release by the executors shown by the second *356] abstract, the purchaser clearly was entitled to have a *conveyance executed by them. That release was upon a 35*s.* stamp; whereas, the deed showing upon the face of it that it operated as a conveyance of property which might be of considerable value, it ought to have had in addition an ad valorem stamp. The real consideration should have been set forth: the amount was ascertainable. The plaintiff was obviously therefore justified in insisting upon the executors joining in the conveyance. Doe d. Kettle *v.* Lewis, 10 B. & C. 673 (E. C. L. R. vol. 21), was a very different case. There, the consideration expressed on the deed was, the rent reserved. This upon the face of it is a mere voluntary conveyance. The 6th condition has no application. This is not an objection to the title. The plaintiff is entitled to recover all the costs he was put to in consequence of the defective abstract first delivered, between the 24th of June and the 12th of August, and also to interest on the deposit from the 24th of June, or at all events from the 17th of November, when the notice to rescind was given.

Bovill, Q. C., and *J. Brown*, in support of the rule.—There is no foundation for the objection to the stamp on the release. In Tilsby's Stamp Laws 227, it is said: "The stamp-duty, in the case of a sale, is intended to be a tax on the value of the property; but it is not in terms imposed on the price agreed to be given: it is charged on the amount of the purchase or consideration money expressed, whether truly or not, in the instrument of conveyance. The understanding is by no means uncommon, that a deed is rendered invalid by the omis-

sion to set forth the true consideration, in the case of a purchase: there is, however, no foundation for any such proposition, although arguments in support of it have occasionally been addressed to the court. The legislature has not thought proper *to make any [*357 such provision (which would, indeed, be of too serious a character), but has adopted the course of imposing severe penalties upon the parties to the fraud, more particularly upon the attorney or other person professionally employed.(*a*) See 48 G. 3, c. 169, ss. 22–26. To these penalties the courts always refer when cases of the kind arise: Robinson *v.* Macdonnell, 5 M. & Selw. 228; Duck *v.* Braddyll, 13 Price 445, M'Clell. 217; Doe d. Kettle *v.* Lewis, 10 B. & C. 673 (E. C. L. R. vol. 21). The case of Doe *v.* Lewis was that of a lease granted in consideration of a rent and also of a premium of 200*l.*, but the latter was not specified: and it was contended, that, inasmuch as under the head 'Lease,' a duty was required to be paid in respect of the consideration for granting the lease, and nothing was said as to the consideration being expressed, such duty was payable whether the premium was mentioned or not: but the court held that a lease with a premium was referred to the head 'Conveyance,' and that, if the premium was not mentioned, the duty was not payable, but the parties were liable to a penalty."(*b*) [ERLE, C. J.—We think the stamp objection fails, the release by the executors of the deceased partner not being invalid by reason of the objection taken by the purchaser's conveyancer. We therefore think, that, as the purchaser stood upon an unsound objection, the vendors had a right to treat that as a requisition on the title within the 6th condition, which, if not waived, gave the vendors a right to rescind the contract. We think, however, the purchaser is not entitled to interest on his deposit, because the deposit was offered back, and the objection was an invalid one. But, with regard to the contract to deliver an abstract *within ten days, [*358 as at present advised, and unless Mr. Bovill and Mr. Brown can induce us to change our opinion, we are disposed to yield to my Brother Parry's argument. It is not necessary that the abstract delivered should be a *perfect* one: but this was a misleading abstract, by reason of the omission to make any mention of the release by the executors of the deceased partner to the surviving partners. That was a matter upon which the purchaser's solicitor could make no requisition. We, however, see no sign of damage to refer to the master. The draft conveyance might have been allowed, if there had been evidence that any had been prepared: but, even then, an alteration of two lines would have made all right. If, therefore, Mr. Bovill will consent to a verdict being entered for the plaintiff for 1*s.*, we think that will be the just result.] The objection to the stamp being disposed of, the plaintiff is not entitled even to nominal damages. It is true, the abstract first delivered was not perfect: but a perfect abstract is in practice never expected; and, indeed, the conditions themselves provide for the delivery of a *further* abstract. In Dart's Vendors and Purchasers, speaking of the condition for the delivery of an abstract, it is said,—p. 81,—"If any other condition refer to 'the delivery of the abstract,'—this, in any question as to time, will

(*a*) Penalty of 500*l.*, and disability thenceforth to act as an attorney, &c.
(*b*) And see Doe d. Higginbotham *v.* Hobson, 3 D. & R. 186.

be held to mean the delivery of a *perfect* abstract, *i. e.* an abstract as perfect as the vendor could furnish at the time of delivery, If the vendor fail to deliver a perfect abstract within the time specified, the purchaser is relieved from any condition binding him to object to the title within a given period after delivery of the abstract: it is not unusual to guard against this rule by providing (in the condition as to the objections) that an abstract shall, as regards any objection or *359] requisition, be considered perfect, if it supply the *information suggesting the same, although it may be otherwise defective," —citing Hobson *v.* Bell, 2 Beavan 17, Morley *v.* Cook, 2 Hare 111, Blacklow *v.* Laws, 2 Hare 40, and Southby *v.* Hull, 2 Mylne & Cr. 211. Again, at p. 103, it is said: "For the purpose of such conditions, time runs from the delivery of a perfect abstract (Hobson *v.* Bell, 2 Beavan 17), that is, an abstract as perfect as the vendor at the time of delivery has either in his actual or constructive possession (Morley *v.* Cook, 2 Hare 111): but a vendor would not be at liberty designedly to deliver an imperfect abstract, or otherwise neglect his duties under the contract, for the purpose of rescinding the contract under such conditions." The sixth condition here is general, and applies as well to the further as to the original abstract.

ERLE, C. J.—I have heard nothing to induce me to alter the opinion I have already intimated. By the conditions of sale in this case the vendors were on the tenth day after the sale to deliver to the purchaser an abstract of their title,—that is, an abstract as perfect as their knowledge or means of knowledge will enable them to furnish. The abstract here delivered was upon the face of it a perfect abstract, showing that the proper parties to convey would be the two surviving partners and the executors of the deceased partner. Yet at that very time the title to one-third of the property (at least the equitable title to it) had passed from the executors to the two surviving partners, by a deed of release which was in the possession of the vendors, but which somehow had been overlooked. Whether that arose from the default of the vendors themselves or of their solicitors, is immaterial. They did not deliver such an abstract as it was their duty to deliver, *360] —an abstract showing the true state of the *title; but the abstract which they delivered showed upon the face of it a title altogether different from the actual title. They therefore clearly did not deliver "an abstract" within the meaning of the conditions, but one calculated to mislead the purchaser's solicitor. They, therefore, have been guilty of a breach of their contract: but, as I before stated, the plaintiff has thereby sustained no real damage, consequently I am of opinion that the rule must be absolute to enter a verdict for nominal damages.

WILLES, J.—I am of the same opinion. The vendors were bound by the conditions of sale to deliver an abstract. They did not within the time limited deliver an abstract of their title. That which they did deliver showed the title to be in them jointly with the executors of the deceased partner; whereas, the real title was, by reason of the deed of the 14th of June, 1860, in the vendors alone. They did not, therefore, in any sense deliver an abstract as perfect as they had at the time of delivery in their actual or constructive possession. The purchaser is consequently entitled to recover. As to the damages he

may be entitled to, that is a very different question. He contracted to buy certain premises from A., B., and C. He might have had a conveyance from A. and B. Practically, he has sustained no damage: it is only by reason of a technical rule that we are bound to award him 1*s*. There has been a technical breach of the contract, which has led to no substantial damage.

The verdict must be entered for the plaintiff on the first, second, third, fourth, and sixth issues, and for the defendant on the fifth and seventh.

The rest of the court concurring,

Rule absolute accordingly.

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*MUMFORD *v.* HITCHCOCKS. *April* 30. [*361

A specially endorsed writ under the 25th section of the Common Law Procedure Act, 1852, was served upon the defendant on Friday, the 27th of March, consequently the eight days for entering an appearance expired on Friday, the 3d of April. That day being Good Friday,—Held, that the defendant was not bound to enter an appearance until the following Wednesday.

ON Friday, the 27th of March last, a specially endorsed writ of summons, under the 25th section of the Common Law Procedure Act, 1852, was served on the defendant. The last day for entering an appearance being Good Friday (the 3d of April), and no appearance having been entered, the plaintiff signed judgment at the opening of the office on Wednesday, the 8th. The defendant thereupon took out a summons to set aside the judgment for irregularity, before Blackburn, J., contending that the office, being closed for the Easter Holidays on Good Friday, Saturday, Monday, and Tuesday, he had the whole of Wednesday for entering an appearance. The learned judge referred the matter to the court.

Field, on a former day in this term, obtained a rule nisi accordingly. He submitted, that, where it becomes impossible by the act of God or of the court to do an act within a given time, the omission to do it is excused; and he referred to The Queen *v.* The Justices of Leicestershire, 15 Q. B. 88 (E. C. L. R. vol. 69), Hughs *v.* Griffiths, 13 C. B. N. S. 324 (E. C. L. R. vol. 106), to the 174th rule of Hilary Term, 1853, which provides, that, "in all cases in which any number of days, not expressed to be clear days, is prescribed by the rules or practice of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless the last day shall happen to fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusively of that day also," and to Chitty's Practice, 11th edit. 159, where it is said, that, "it seems that, *independently of this rule, where a party has a certain number of days to do an act [*362 by the practice of the courts, and the last day for doing such act falls on a holiday, then such day is not excluded from computation; but that, if the party cannot do the act unless the offices are open, and the last day for doing it falls on a day upon which the offices are closed, by reason of its being a holiday there, such day is not reckoned." [WILLES, J., referred to Rowberry *v.* Morgan, 9 Exch. 730.] There,

the last day for entering an appearance was Saturday the 18th. No appearance having been entered, the plaintiff was entitled to issue execution at the expiration of eight days from that day; and, the eighth day being Sunday, the 26th, it was held that the plaintiff was entitled to issue execution on the 27th. That case, therefore, does not touch this.

Thomas Chitty showed cause.—Where a statute gives a certain number of days within which an act is to be done, if the last of those days happens to be a Sunday or Holiday, the act must be done on the day preceding. There is nothing in any act of parliament to exclude Good Friday from the computation of time, except the 11th section of the Uniformity of Process Act, 2 W. 4, c. 39,(*a*) which however
*363] only applies to process issued *under the authority of that act, and does not extend to writs issued under the Common Law Procedure Act, 1852. It must be assumed that that provision was intentionally omitted from the last-mentioned act. The plaintiff must, therefore, rely on the 174th rule of Hilary Term, 1853, as to which Parke, B., in Rowberry *v.* Morgan, 9 Exch. 733, observes,—"The 174th rule was not intended to apply to an enactment which provides for an entirely new state of proceedings, but merely to explain those proceedings which are according to the ordinary practice of the courts. It was never intended, therefore, that those rules of which the 174th is one should vary the plain words of the act of parliament." And, in giving judgment, the same learned judge says: "I think, that, even supposing the rules of Hilary Term, 1853, which were promulgated by the judges under the general authority given them to regulate the practice of their courts, could have the effect of altering the provisions of an act of parliament, it was never intended that they should have any such effect. Those rules were merely made with a view to the interpretation of the practice of the courts, and not to the interpretation of the language of this statute; and consequently the 174th rule does not in any way interfere with the 27th section. That section empowers a plaintiff to sign judgment in a certain event there mentioned; and he may, upon 'such judgment, issue execution at the expiration of *eight* days.' Now, this is an entirely new provision, introduced for the first time by this act of parliament: and, unless this
*364] enactment is controlled by some other clause of the statute, *or in some other way, we must interpret it to mean what it says, namely, that such eight days include Sunday, whether that day be either one of the intermediate days or the last of such eight days." In The Queen *v.* The Justices of Middlesex, 17 Law J., M. C. 111, 7 Jurist 396, the 4 G. 4, c. 95, s. 87 (the Turnpike Act), requiring a notice of appeal to be served within six days after the cause of com-

(*a*) "If any writ of summons, capias, or detainer *issued by authority of this act* shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon without delay at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation: Provided always, that, if the last of such eight days shall in any case happen to fall on a Sunday, Christmas Day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days; and, if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter Day, then and in every such case the Wednesday after Easter Day shall be considered as the last of such eight days." See Harris *v.* Robinson, 2 C. B. 908 (E. C. L. R. vol. 52), and see Chambers *v.* Smith, 12 M. & W. 2.

plaint,—it was held that, where the conviction was on the 2d of May, service of the notice of appeal upon the 9th, the 8th being Sunday, was not in time.(a) And in Peacock, app., The Queen, resp., 4 C. B. N. S. 264 (E. C. L. R. vol. 93), it was held by this court that Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior courts under the 20 & 21 Vict. c. 43, s. 2, although it be the last day. [ERLE, C. J.—In those cases the court had no power to dispense with the statutable condition that a certain act should be done by the party within a given number of days, there being no act of God or of the court to interfere with the performance of the condition.] In Wilks *v.* Perks, 6 Scott, N. R. 42, 5 M. & G. 376 (E. C. L. R. vol. 44), it was held that three days succeeding Christmas day are to be reckoned in rules to plead, &c., though kept as holidays at the offices, by virtue of the exception in the 3 & 4 W. 4, c. 42, s. 43. And in Ex parte Simpkin, 29 Law J., M. C. 23, by s. 40 of the 18 & 19 Vict. c. 121, the Nuisances Removal Act, 1854, it is provided that an appellant shall not be heard in support of an appeal to the sessions against an order of justices, unless within fourteen days after the making of the order he give a notice in writing, &c., "and shall within two days of giving such notice enter into a recognisance before some justice of the peace," &c.; and it was held *that Sunday is to be counted in the two days, [*365 and therefore, where notice of appeal was given on Friday, but the recognisance was not entered into till the following Monday, it held that the sessions could not hear the appeal. [ERLE, C. J.—The same remark applies to this as to the other cases.] In Lewis *v.* Calor, 1 Fost. & Fin. 306, Erle, C. J., ruled, that, under the Bills of Exchange Act, 18 & 19 Vict. c. 67, Sunday, if the last day, is not included in the twelve days allowed for appearing to the writ. [WILLES, J.—Is there any case on the 11th section of the Common Law Procedure Act, as to renewing writs?] There is. A writ of summons, issued on the 23d of January, 1861, was duly renewed at intervals of six months up to and on the 19th of July, 1862, and an application to renew it again was made on the 19th of January, 1863, (the 18th being Sunday), to the proper officer, who refused to seal it under the above provision, on the ground that six months had elapsed since the date of the last renewal: and the Court of Exchequer refused to direct the officer to seal the writ,—Anonymous, 32 Law J. Exch. 88. The case of Rowberry *v.* Morgan, 9 Exch. 730, it is submitted, is precisely in point, and must govern this case.

Field, in support of his rule.—By the practice of the court, independently of any statute or rule, the defendant had the whole of the Wednesday following the Easter recess for entering his appearance. If necessary, reliance will be placed on the 174th rule of Hilary Term, 1853, and also upon the 11th section of the Uniformity of Process Act, 2 W. 4, c. 39. Where an act is to be done which can only be done by the party when the offices of the court are open for the transaction of business, and the last day for doing it happens to be a day on which for some reason the office is *closed, he must necessarily have until the end of the next open day. The act of [*366

(a) And see Rawlins, app., The Overseers of West Derby, resp., 2 C. B. 72 (E. C. L. R. vol. 52).

appearing was formerly done *in court:* that, of course, could only take place when the court was open. Rowberry *v.* Morgan, 9 Exch. 730, is altogether inapplicable. The defendant had nothing to do there: the only question was, whether the eighth day for the plaintiff to issue execution fell on the Sunday or the Monday. Parke, B., says, that, "in the case of pleading, the defendant is bound to take a step in the cause; but that is not so here, for the defendant has not to take any step, although a certain time is pointed out within which he may, if he pleases, apply to the court or a judge; but that is not in the nature of a step in the cause to be taken by the defendant, properly so called." Here, the offices are closed from Friday until Wednesday. Suppose the defendant was served with the writ of summons on the previous Tuesday at a distance from London. If the argument on the part of the plaintiff is of any value, the defendant would in that case have been bound to enter his appearance on the Thursday. What time would that afford him for taking advice? Hughes *v.* Griffiths, 13 C. B. N. S. 324 (E. C. L. R. vol. 89), is precisely in point. Erle, C. J., there says: "By the statute,"—the Absconding Debtors Act, 14 & 15 Vict. c. 52,—"the creditor is authorized to obtain a warrant for the arrest of his debtor when there is reason to believe he is about to abscond; and he is required forthwith to cause a writ of capias to be issued, and to cause the debtor, if in custody, to be served with such writ *within seven days from the date of such warrant,* including the day of such date; and then the action is to proceed in the ordinary way. Now, the capias cannot be issued unless the court is in a position to act. I am of opinion, that, when the last of the seven days happens to fall on a day which is declared to be a holiday, and on which the court *cannot act, the party has until the next following day on which the court can act to issue his writ. It seems to me that the distinction between a thing which is to be done by the court and a mere act of the party, is maintainable. Where the act is to be done by the court, and the court refuses to act on that day, the intendment of the law is, that the party shall have until the earliest day on which the court will act. Here, the seventh day fell on Good Friday, when no writ could issue. I think it was well issued on the Wednesday, which was the earliest day on which it could issue." The same rule is adopted in practice in the Court of Chancery and in the Admiralty Court. The rules made under the authority of the 223d section of the Common Law Procedure Act, 1852, are as binding and obligatory as if enacted by parliament. The Court of Exchequer, in Rowberry *v.* Morgan, say that the 174th rule of Hilary Term, 1853, was not intended to have the effect of altering the provisions of the statute. It is difficult to see why not. [WILLES, J.—The pleading rules referred to in the second branch of the 223d section were under the 13 & 14 Vict. c. 16, to be laid before both Houses of Parliament, and were thenceforth to have the like force and effect as if they had been enacted by parliament: but the other set of rules were only to have the force and effect of rules of court.] Whatever be their precise binding effect is not material here, because this is not a matter which is expressly provided for by the statute: it is matter of procedure: Studley *v.* Sturt, 2 Stra. 782; Bullock *v.* Lincoln, 2 Stra. 876; Mesure *v.* Britten, 2 H.

*367]

Bl. 616.(a) The *Uniformity of Process Act, 2 W. 4, c. 39, is not repealed by the Common Law Procedure Act, except where it is so expressly provided: see ss. 10, 12, 24, and 26. The 11th section of the former act may therefore be read as part of the Common Law Procedure Act, 1852, and a writ issued under the last-mentioned act may well come under the operation of the 2 W. 4, c. 39, s. 11. In Morris *v.* Barrett, 7 C. B. N. S. 139 (E. C. L. R. vol. 97), by a judge's order the debt and costs were to be paid by instalments of 2*l.* on the 25th of each month. The 25th happening to be a Sunday, the instalment was offered on Monday, and refused, and judgment was signed on the following day. The court set aside the judgment, holding that the defendant had the whole of Monday to pay the money. [ERLE, C. J.—That was matter of contract.] [*368

ERLE, C. J.—By the terms of the 27th section of the Common Law Procedure Act, 1852, a defendant served with a specially endorsed writ is bound to appear thereto within eight days, and in default of his so doing final judgment may be signed against him. The question raised by this rule, is, whether, where the last of the eight days falls on one of the days when the office is closed for the Easter Holidays, the party has until the next day after the holidays to appear. I am of opinion that he has. The appearance to the writ of summons is the combined act of the court and of the party; it cannot be done by the party unless the office is open and the officer ready to receive it. By force of the statute and the rules of the court, the offices of *the court are closed for all purposes between the Thursday before and the Wednesday next after Easter Day. The intervening days therefore are to be taken as being equivalent to the Sunday, and are days upon which this combined act of the court and of the party cannot take place. I found my judgment, not upon the authority of any particular case which has decided, that, where an act is to be done within a certain number of days, and the last of those days happens to be a Sunday, the party has the whole of the following day upon which to do it: but I rest upon the practice which has prevailed from the earliest time, which precludes the doing of any judicial act on a Sunday. I think the analogy applies to those days which by the rules and practice of the court are made equivalent to the Sunday. The judgment, therefore, will be set aside, but without costs. [*369

The rest of the court concurring,

Rule absolute accordingly.(b)

(a) In this case the rule to plead expired on the Purification, and it was insisted on the part of the defendant that that being dies non juridicus, he was not bound to plead until the next day. Le Blanc, Serjt., contra, observed that though the courts did not sit on the Purification, yet the offices were open, and therefore the defendant might have pleaded on that day; and he relied on Baddely *v.* Adams, 5 T. R. 170. Eyre, C. J., said: "The reason of Sunday not being a day of business is, the decent observance of the Sabbath; but, as the offices are open on these other dies non juridici, the party may certainly plead them."

(b) And see 2 Madd. Exchequer Practice, 5; 5 & 6 Ed. 6, c. 3; and Lord Coke's commentary thereon, 2 Inst. 264.

*370] *CORY v. DAVIS. *April* 18.

The following document was held to be admissible in evidence without either a promissory note or an agreement stamp,—"I, J. D., have this day borrowed of J. C. 300*l.*, at 4*l.* per hundred payable yearly."

It is not competent to the judge at nisi prius, under the 21st section of the Common Law Procedure Act, 1854, to reserve a question as to the admissibility of a document on a stamp objection, unless he decides against its admissibility.

THIS was an action for money lent. The defendant pleaded, nunquam indebitatus, and the Statute of Limitations.

The cause was tried before Byles, J., at the last Assizes at Winchester. In support of the plaintiff's case, the following document was put in,—"I, James Davis, have this day borrowed of John Cory 300*l.*, at 4*l.* per hundred, payable yearly."

On the part of the defendant it was submitted that this document was either a promissory note or an agreement, and in either case was inadmissible, being unstamped.

The learned judge received it, but gave the defendant leave to move to enter a verdict for him if the court should be of opinion that it was inadmissible without a stamp, and incapable of being stamped. He also reserved leave to the plaintiff to stamp the document if a stamp were necessary and it could be stamped.

Cole now moved, pursuant to the leave reserved to him, to enter a verdict for the defendant. He submitted that the memorandum was inadmissible upon principle, for that it amounted to a promissory note. He, however, admitted that it was extremely difficult to distinguish the case from Melanotte *v.* Teasdale, 13 M. & W. 216, where the following document was held by the Court of Exchequer not to require a stamp either as an agreement or as a promissory note,—"1839. Nov. 11. I. O. U. 45*l.* 13*s.*, which I borrowed of Mrs. Melanotte, and to pay her 5 per cent. till paid. Robert Teasdale." It
*371] was put upon the ground that *this was not a promise to pay at any particular time, and therefore not liable to be stamped as a promissory note; nor was it liable to be stamped as an agreement, inasmuch as it was not necessarily of the value of 20*l.*

ERLE, C. J.—I cannot entertain this motion for a moment. This is neither a promissory note nor an agreement. It is a mere memorandum. There are numerous cases collected in Chitty's Statutes, Vol. 3, pp. 1245, 6, Title *Stamps, Agreement*, which place that beyond a doubt.

WILLES, J.—I am entirely of the same opinion. I do not think it is competent to the judge under the 21st section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, to reserve such a question as this, unless he decides against the admissibility of the document.(*a*)

The rest of the court concurring, Rule refused.

(*a*) See Siordet *v.* Kucsynski, 17 C. B. 251; Tattersall, app., Fearnly, resp., 17 C. B. 368 (E. C. L. R. vol. 84).

*SHAW *v.* COFFIN. *April* 18. [*372

Held, that the following words in an agreement for letting do not create a *condition*,—"The said A. (the tenant) hereby agrees that he will not underlet the said premises without the consent in writing of the landlord."

THE defendant held premises under a written agreement which contained the following stipulation,—"The said A. Coffin hereby agrees that he will not underlet the said premises without the consent in writing of the landlord thereof." In defiance of this stipulation, the defendant let the premises to the plaintiff for a year, without his landlord's consent; whereupon the landlord brought an ejectment against the now plaintiff, who suffered judgment to go by default, and was turned out. The agreement contained no clause of re-entry. The plaintiff then brought this action against the defendant for falsely representing that he had power to let.

At the trial before Byles, J., at the sittings at Westminster after the last Term, it was submitted on the part of the defendant, that the above-mentioned words in the agreement did not amount to a condition, but were mere words of contract, and consequently that the plaintiff had improperly yielded to the ejectment. The plaintiff was thereupon nonsuited.

Eyre Lloyd now moved for a new trial, on the ground of misdirection.—The words in question clearly create a condition. The case is not to be distinguished from Doe d. Henniker *v.* Wall, 8 B. & C. 308 (E. C. L. R. vol. 15), 1 M. & R. 694. There, by a memorandum of agreement, in consideration of the rent and conditions thereinafter mentioned, A. was to have, hold, and occupy as on lease certain premises therein specified, at a certain rent per acre; and it was stipulated and conditioned (amongst other things) that A. should not assign, transfer, or underlet any part of the lands and premises, otherwise than to his wife, child, or children; *and it was held that by [*373
the last clause a *condition* was created, for breach of which the lessor might maintain an ejectment. Bayley, J., there says: "A party who demises land by an instrument not under seal may introduce a condition into it, provided he use apt and proper words for the purpose. The words 'provided always, sub conditione, ita quod,' used in a conveyance of real estate, by themselves, make the estate conditional. But, in a lease for years, no precise form of words is necessary to make a condition. It is sufficient if it appear that the words used were intended to have the effect of creating a condition. They must be the words of the landlord, because he is to impose the condition. Here, first, the agreement purports to be in consideration of the rent and *conditions* thereinafter mentioned; and then the words 'it is stipulated' occur more than once: and then, in the last sentence of the instrument come the words 'it is lastly stipulated and conditioned that Watt shall not assign, transfer, underlet, or part with any part of the lands, otherwise than to his wife or children.' These words are clearly introduced into the instrument on the part of the lessor, for they are for his benefit. The word *conditioned* is fairly a word of condition. In pleading, a bond is stated to be conditioned for payment of money. It is said that the word *stipulated* and the

word *conditioned*, being used together, have the same meaning, and import a covenant, and not a condition: but there are several authorities which show, that, if words both of covenant and condition are used in the same instrument, they both shall operate. If the word *stipulated* import a covenant, it will operate as such; and if the word *conditioned* import a condition, it must also operate." So here, the words of this stipulation are the words and for the benefit of the landlord.

*374] *ERLE, C. J.—The words of the instrument there were very strong: "it is stipulated and *conditioned*." Mr. Justice Bayley never intended to say that mere words of contract like these will create a condition. The nonsuit was right.

WILLES, J.—Lord Coke (Co. Litt. 201, a, et seq.) gives a list of the words which create a condition. There are no words in this agreement which can have that effect.

The rest of the court concurring, Rule refused.

CORDERY v. COLVIN. *April* 20.

A promise to pay by the drawer of a bill of exchange after its maturity, is evidence either of due notice of dishonour having been given, or of a waiver of notice: and, if necessary, in such case the court will amend.

THIS was an action by the endorsee against the drawer of a bill of exchange, with a count upon an account stated. To the count on the bill the defendant pleaded a denial of the presentment and of the notice of dishonour, and, to the account stated, never indebted.

At the trial before the secondary of London, it appeared that the bill was made payable at the drawer's own house; that, on its becoming due, the plaintiff took it there and showed it to the defendant's wife; and that the defendant subsequently made repeated promises to pay the amount when he should be able.

The secondary ruled that this was evidence from which the jury might presume either that the defendant had received notice of the

*375] dishonour of the bill or *that he had waived it; and under his direction a verdict was found for the plaintiff.

Littler now moved for a new trial on the ground of misdirection.—He submitted, that, in order to let in the evidence, there should have been a special replication,—referring to Byles on Bills, 8th edit. 281, where it is said, that "a prior dispensation with notice, as, an absence of effects, must be specially alleged in the declaration: Cory *v.* Scott, 3 B. & Ald. 624 (E. C. L. R. vol. 5); Burgh *v.* Legge, 5 M. & W. 418. So must the impossibility of giving notice, or any other excuse for not giving it: Allen *v.* Edmundson, 2 Exch. 719. *And it is conceived that a subsequent promise, when used as a waiver of notice, must also be specially pleaded.*" [WILLES, J.—This point is settled by the judgment of Bramwell, B., in Rabey *v.* Gilbert, 6 Hurlst. & N. 536. The older cases are inapplicable since the provisions enabling the courts to amend.]

ERLE, C. J.—There was abundant evidence either that the defend-

ant had notice or that he waived it. In such a case, if the jury infer liability, the court will sustain their verdict.

WILLES, J.—The conduct of the defendant amounts to an acceptance of the notice nunc pro tunc.

BYLES, J.—A promise to pay is an acknowledgment of liability. Here, the subsequent promise was either evidence of the fact of notice having been received, or that it had been waived. If necessary, the court is not only able but is bound to amend in such a case.

KEATING, J., concurred. Rule refused.

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*MARKHAM *v.* STANFORD. *April* 15. [*376

Trustees of a turnpike-road, under the 55th section of the General Turnpike Act, 3 G. 4, c. 126, put up tolls to farm subject to a condition that a month's rent be paid in advance, to be forfeited "if such taker shall refuse or neglect to execute the usual articles of agreement, with two sureties," by a given day, or "shall refuse or neglect to enter on the said tolls, or, having executed such agreement with sureties, and having entered upon the said tolls, shall not in all things fulfil and perform the covenants, &c., to be contained in such agreement." The defendant, who was the highest bidder, signed the following memorandum,—"I do hereby agree to take the tolls of, &c., at the sum of 411*l.*, and I do hereby agree on my part to fulfil the conditions for letting the tolls, and do hereby propose A. and B. as my sureties." This memorandum was signed by the defendant and by the clerk to the trustees (under s. 57), but not by the sureties. No other agreement was executed, and the defendant, though he paid the month's rent in advance, declined to enter upon the tolls:—

Held, that the above memorandum constituted a valid demise of the tolls; the stipulation as to the sureties being a stipulation for the benefit of the trustees, which it was competent to them to waive.

THIS was an action brought by the plaintiff as clerk to the trustees of the Wootton and Courteenhall turnpike-roads, in the county of Northampton, against the defendant as lessee of the tolls, for rent alleged to be due under an agreement of demise of such tolls, dated the 3d of October, 1861.

The cause was tried before Pollock, C. B., at the last Summer Assizes at Northampton. The facts which appeared in evidence were as follows:—On the 3d of October, 1861, the trustees of the turnpike-road in question, having given the notice required by the 55th section of the General Turnpike Act, 3 G. 4, c. 126, proceeded to let the tolls by public auction. The letting was subject, amongst others, to the following condition:—

"One month's rent in advance to be immediately paid down as a deposit by the person taking the said tolls, which is to be forfeited if such taker shall refuse or neglect to execute the usual articles of agreement, with two sufficient sureties, to be approved by the trustees, prior to the 1st day of November, at the office of Mr. A. B. Markham, attorney, at Northampton, or shall refuse or neglect to enter on the said tolls, or, having executed such agreement with sureties, and having entered on the said tolls, shall not in all things fulfil and perform the covenants, conditions, and agreements contained in such agreement."

*The defendant was the highest bidder, and the tolls were accordingly knocked down to him, and the following memo- [*377

randum was drawn up and executed by him and also by the clerk to the trustees:—

"I, the undersigned, John Stanford, of Tewkesbury, in the county of Gloucester, toll-gate keeper, do hereby agree to take the tolls of the Wootton and Courteenhall gates at the sum of 411*l.*; and I do hereby agree on my part to fulfil the conditions for letting the tolls, and do hereby propose Joseph Dickens, of Northampton, fishmonger, and William Whitbread, of Courteenhall-Gate, toll-collector, as my sureties. Dated this 3d October, 1861.

"JOHN STANFORD.

"A. B. MARKHAM, clerk to the trustees."

"Deposit 34*l.* 5*s.*"

The defendant, having paid the deposit, declined to enter upon the tolls, and never did execute any agreement with sureties pursuant to the above condition.

On the part of the defendant it was submitted that the action was not maintainable, inasmuch as there was no sufficient agreement for the letting of the tolls in question within the 57th section of the statute.

The learned Chief Baron adopted this view, and thereupon directed a verdict for the defendant, with leave to the plaintiff to move to enter the verdict for him, if the court should be of opinion that the defendant was liable under the demise of the 3d of October, 1861.

Field, in Michaelmas Term last, obtained a rule nisi accordingly.

Beasley now showed cause.—The provisions of the statute upon
*378] which the question mainly turns are the *55th and 57th,—the 56th, which provided for the payment of the rent, having been repealed by the 4 G. 4, c. 95, s. 51. The 55th section enacts "that it shall and may be lawful for the trustees or commissioners of every turnpike-road, at a public meeting, to let to farm the tolls of the several gates erected upon their respective turnpike-roads, in the manner hereinafter mentioned, although no express power shall have been given by any act or acts for that purpose; and that, whenever any tolls shall hereafter be let to farm by virtue of the powers given by this or any other act or acts of parliament, the following directions shall be observed, that is to say, the trustees or commissioners shall cause notice to be given of the time and place for letting the same, at least one month before the day to be appointed for that purpose, by affixing the same upon every toll-gate belonging to such turnpike-road, and also by insertion thereof in some public newspaper circulated in that part of the country, and specifying in every such notice the sum which the said tolls produced in the preceding year, clear of the salary for collecting the same, in case any hired collector was appointed, and that they will let such tolls by auction to the highest bidder, on his producing sufficient sureties for payment of the money monthly or otherwise (as in such notice shall be specified), and that they will be put up at the sum which they were let for or produced in the preceding year, clear of the salary of the collector; and, to prevent fraud or any undue preference in the letting thereof, the trustees or commissioners are hereby required to provide a glass with so much sand in it as will run from one end of it to the other in one minute, which glass at the time of letting such tolls shall be set upon

a table, and immediately after every bidding the glass shall be turned, and as soon as the sand is run out it shall be *turned again, and so for three times, unless some other bidding intervenes, and if no other person shall bid until the sand shall have run through the glass three times, the last bidder shall be the farmer or renter of the said tolls, and *shall forthwith enter into a proper agreement for the taking thereof, and paying the money at the times specified in such notice, with such surety or sureties for payment thereof, and under such conditions and in such manner as the said trustees or commissioners shall think fit;* and if the person being the last bidder shall not forthwith enter into such agreement, it shall and may be lawful to put up the said tolls again immediately for another bidder, and in like manner to continue putting up the same until a bidder shall be found who shall enter into such agreement." And the 57th section enacts "that all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike-roads, signed by the trustees or commissioners letting such tolls, or any two or more of them, or by their clerk or treasurer, and the lessee or farmer, *and his sureties,* of such tolls respectively, shall be good, valid, and effectual, to all intents and purposes, notwithstanding the same may not be by deed or under seal, any act or acts of parliament or law to the contrary thereof notwithstanding." The memorandum which the defendant has signed here is not an agreement within the meaning of these provisions, which must be strictly complied with: it is a mere undertaking on his part to sign the statutory agreement, for the breach of which he might possibly be liable to an action, but not in this form. This is the first time such an instrument as this has been treated as the demise of the tolls. So strictly has the statute been construed, that, in Bell *v.* Nixon, 9 Bing. 393 (E. C. L. R. vol. 23), 2 M. & Scott 534, it was held, that, where two persons fill the office of clerk to the *trustees of a turnpike-road, both must join in executing a contract on the part of the trustees, under s. 57. [WILLES, J.— A corporation is not liable upon a demise not under seal; but, where it has actually used and occupied land for a corporate purpose, it may be sued for use and occupation: Lowe *v.* The London and North-Western Railway Company, 18 Q. B. 632 (E. C. L. R. vol. 83). BYLES, J.—In Shepherd *v.* Hodsman, 18 Q. B. 316,—where it was contended that the statute 8 & 9 Vict. c. 106, s. 3, which provides that "a lease required by law to be in writing of any tenements or hereditaments" shall be void at law unless made by deed, applied to agreements for the leasing of tolls under the 3 G. 4, c. 126,—Lord Campbell says: "As to the objection that such agreements ought now to be under seal, I think it would be strange to hold that the provisions of stat. 8 & 9 Vict. c. 106, which was passed for the purpose of amending the law of real property, were intended to embrace statutory agreements made under stat. 3 G. 4, c. 126. Indeed, if we were to construe the latter statute strictly, we should find that it does not require the lease itself of the tolls to be in writing at all, but only that the agreement for such lease, *which operates of course as a lease,* must be in writing: so that stat. 8 & 9 Vict. c. 106, s. 3, could not apply."] The trustees might have pursued the course pointed out by s. 55, on the defendant's refusal to execute the formal contract, viz. put up the tolls

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again to competition. In Oldroyd *v.* Crampton, 4 N. C. 24, 5 Scott 256, it was held that the declaration on a demise of tolls by trustees under this statute must allege that the demise was in writing and signed by two or more trustees or their clerk. The attention of Lord Campbell was not called to that case in Shepherd *v.* Hodsman.

*381] *Field* and *Markham*, in support of the rule.—There *are ample words in the memorandum of the 3d of October, 1861, to constitute a perfect demise of the tolls in question. "I do hereby agree to take the tolls at the sum of 411*l.*, and I do hereby agree to fulfil the conditions for letting the tolls," &c. And this is signed by the lessee and by the clerk to the trustees. What more could be necessary to constitute a demise, even assuming that a writing is necessary? Such words have over and over again been held to constitute a present demise: and the fact that a provision is made for the future execution of a more formal instrument does not prevent its operating as a present demise. That the sureties have not executed the agreement, is not an objection that lies in the mouth of the defendant. The 57th section, referring to the execution by the sureties, merely followed the 56th section, which supposed all the parties to be present at the letting.

ERLE, C. J.—It appears to me that the plaintiff's claim in this case is abundantly sustained. The 55th section of the 3 G. 4, c. 126, empowers the trustees of turnpike-roads to let to farm the tolls in the manner therein mentioned, that is, by auction, to the best bidder, who is to enter into a proper agreement (with sureties) for the taking of the tolls and the payment of the money at the stipulated times; and the 57th section provides that "all contracts and agreements to be made or entered into for the farming or letting the tolls of any turnpike-roads, signed by the trustees or commissioners letting such tolls, or any two or more of them, or by their clerk or treasurer, and the lessee or farmer, *and his sureties*, of such tolls respectively, shall, be good, valid, and effectual to all intents and purposes, notwithstanding the same may not be by deed or under seal." The tolls of the Woot-

*382] ton and *Courteenhall gates were put up to let by auction under a condition that a month's rent in advance should be paid down immediately as a deposit, which was to be forfeited if the party taking the tolls should refuse or neglect to execute the usual articles of agreement with two sureties prior to a given day, or should refuse or neglect to enter on the said tolls, &c. The defendant was the highest or best bidder, and at the time of the letting he entered into an agreement in the following form,—"I do hereby agree to take the tolls of the Wootton and Courteenhall gates at the sum of 411*l.*, and I do hereby agree on my part to fulfil the conditions for letting the tolls," and he paid the deposit of a month's rent, and gave the names of two proposed sureties. The agreement is signed by the defendant and by the clerk to the trustees. That memorandum clearly amounts to a demise of the tolls.(*a*) If the sureties had signed it, it could not be denied that it would have been a perfect instrument. Then, is it void because a stipulation which is inserted for the benefit of the trustees, and which it was perfectly competent to them to waive, has not been complied with? It seems to me that the non-

(*a*) *Quære*, for how long? The 55th section limits the power of letting to three years.

compliance with provisions which are for the benefit of the lessor, never can form a ground of defence on the part of the lessee. I think, therefore, there was a valid demise of the tolls in question, and a contract on the defendant's part to pay the rent monthly, pursuant to the conditions of the letting. The tolls became vested in the defendant, and he became liable to pay the monthly instalments, the trustees not having taken advantage of the non-compliance with the conditions.

WILLES, J.—I am entirely of the same opinion.

*BYLES, J.—I am of the same opinion, although I was at first inclined to entertain some doubt. But, upon more mature [*383 consideration, I think this was a sufficient demise executed by the clerk to the trustees and by the lessee of the tolls, and that it matters not that the proposed sureties have not executed it. Its execution by the sureties was a stipulation for the benefit of the trustees, which, as my Lord has observed, it was competent to them to waive,—Quilibet potest renunciare juri pro se introducto. It is plain that the lessee entered, for the deposit was a payment of one month's rent in advance.

KEATING, J.—I am of the same opinion. There was some evidence of the receipt of tolls by the defendant through the intervention of one of the persons proposed as surety. Rule absolute.

BAKER *v.* SAMPSON. *April* 20.

Where a husband by his cruelty compels his wife to live apart from him, he is liable upon contracts made by her for necessaries, notwithstanding she in fact receives from him an allowance which is found by the jury to be insufficient, regard being had to his means and position in life.

THIS was an action for goods sold and delivered. Plea, never indebted.

The cause was tried before Byles, J., at the second sitting in London in Hilary Term last. The goods in respect of which the action was brought consisted of household furniture supplied to the wife of the defendant who was living apart from him. It appeared, that, at the time of the marriage, the defendant was an assistant to a druggist; that, besides jewels and trinkets of some value, the lady was possessed of 1550*l.* in the funds, which the defendant with her consent sold out, and bought with the proceeds a druggist's *business; that finding the business not to answer his expectations, the defendant [*384 sold it for a sum of 850*l.*; that, in consequence of repeated acts of cruelty on his part, the wife left him; that he proposed to make her an allowance of 1*l.* per week for her support, which she was willing to accept provided he gave security for its due payment, but that he declined to give such security; and that, the wife having taken an unfurnished apartment, the plaintiff supplied her with furniture to the amount of 20*l.* 5*s.* The 1*l.* per week was regularly paid.

On the part of the defendant, it was insisted, upon the authority of Johnston *v.* Sumner, 3 Hurlst. & N. 261, and Biffin *v.* Bignell, 7 Hurlst. & N. 877, that the circumstance of the husband making the wife an allowance for her maintenance rebutted the presumption of agency arising from the relation of the parties.

The learned judge left it to the jury to say,—first, were the goods necessaries suitable to the position in life of the husband?—secondly, was the amount of allowance agreed on between the husband and wife, or was it subject to a condition that he should find security for its payment, or to any other condition?—thirdly, was the allowance made and paid sufficient, regard being had to the circumstances of the parties?

The jury found that the goods were necessaries,—that there was no actual unconditional agreement for the allowance,—and that the sum paid was not an adequate provision.

The learned judge thereupon directed a verdict to be entered for the plaintiff for the amount of his claim.

Patchett, in Hilary Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendant. He submitted that the court and jury had nothing to do with the adequacy *385] *of the allowance, but that, if the wife received anything in the shape of maintenance from her husband, her agency ceased: Johnston *v.* Sumner, 3 Hurlst. & N. 261; Biffin *v.* Bignell, 7 Hurlst. & N. 877. He also referred to Selwyn's Nisi Prius, 12th edit. 330, where it is said, upon the authority of a MSS. case of Ozard *v.* Darnford (B. R. Middlesex Sittings after M. T. 20 G. 3), that, as, "in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of the separation; for, in such cases, he must trust her at his peril." He also moved for a new trial, on the ground that the verdict was not warranted by the evidence.

Denman, Q. C., now showed cause.—There was abundant evidence of authority in the wife to pledge the credit of her husband. She was compelled by his cruelty to live apart from him; there was no *agreed* allowance (as there was in Johnston *v.* Sumner); and the jury have found that the sums paid to the wife were inadequate to her maintenance. The doubt suggested at the end of the judgment in that case is at variance with the earlier authorities, and was declared by Bramwell, B., in Biffin *v.* Bignell, to be unfounded.

Patchett, in support of his rule.—The fact of the wife receiving an allowance from her husband for her maintenance is an answer to any implied agency on her part to make contracts to charge him for necessaries supplied to her. [ERLE, C. J.—If the husband drives his wife away by his cruelty, she is entitled to make contracts to charge him for necessaries; and it is no answer that he makes her an allowance which the jury have pronounced to be insufficient.] Biffin *v.* Bignell *386] decides that the adequacy *or inadequacy of the allowance is not the question; but that is simply a question of agency.

ERLE, C. J.—I am of opinion that this rule should be discharged. The jury have found that the defendant by his cruelty compelled his wife to live apart from him, that there was no agreement for a separate maintenance, that the allowance actually paid was inadequate to the support of the wife, regard being had to the means and position of the husband, and that the goods supplied were necessaries.

The rest of the court concurring, Rule discharged.

LEE and Another *v.* JONES. *April* 15.

One P. had been employed by the plaintiffs in the sale of coals for them on commission, for which he at the end of each month gave them his acceptances, and by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. having fallen in arrear to the extent of 127*l.*, the plaintiffs required him to find security to the amount of 300*l.*, and at his request the defendant consented to guarantee 100*l.* The agreement of guarantee recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties.

In an action against the defendant on the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact:—Held, that the non-communication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them, was evidence for the jury in support of the plea.

THIS was an action brought by the plaintiffs, who carry on the business of coal-merchants, against the defendant, to recover 100*l.*, the amount for which he agreed to become surety to them for one James Packer, a person employed to sell coals on commission for the plaintiffs.

The declaration stated, that, by a certain agreement,—after reciting that James Packer had for some time then past been a salesman of coals upon *commission for the plaintiffs, he the said James [*387
Packer giving bills of exchange to the plaintiffs for all such
coals as might be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills were respectively running; and after reciting that the plaintiffs requiring security from the said James Packer, they stipulated, amongst other things, that N. C. Sendall, G. Theobald, J. G. Antrobus, the defendant, and H. W. Ruel, should give them the plaintiffs a floating and continuing guarantee for the term of three years from the date of the said agreement, on behalf of the said James Packer, to secure to them the said plaintiffs the amount of any balance which might at any time or times be due to them the plaintiffs from the said James Packer upon any such coal account or bills, to the amount of 300*l.*, in the proportions following [the defendant in the sum of 100*l.*, and each of the other sureties in the sum of 50*l.*], making together the said sum of 300*l.*; and, in order to induce the plaintiffs to continue the said arrangement with the said James Packer, the said N. C. Sendall, G. Theobald, J. G. Antrobus, the defendant, and H. W. Ruel, agreed to enter into the said agreement for guarantee in manner thereinafter appearing,—they the said N. C. Sendall, G. Theobald, J. G. Antrobus, the defendant, and H. W. Ruel, in consideration that the plaintiffs would continue for more than one month then next to allow to the said James Packer a certain commission upon the sale of coals referred to in an agreement between the said James Packer and the plaintiffs, bearing date the 1st of November, 1856, and would not for the said month terminate and put an end to the agreement, severally and respectively guaranteed, promised, and agreed to and with the plaintiffs that they the said N. C. Sendall, G. Theobald, J. G. Antrobus, the *defendant, and H. W. Ruel, [*388
should and would severally pay and make good, in the respective portions hereinbefore mentioned, to the plaintiffs or their executors, administrators, or assigns, all such sum and sums of money as

might be due and owing to them the plaintiffs at any time or times during the said term of three years from the said James Packer in relation to the said agreement or bills of exchange, not exceeding in the whole the said sum of 300*l.*, such guarantee to be a continuing guarantee and to be made good at any time by the said N. C. Sendall, G. Theobald, J. G. Antrobus, the defendant, and H. W. Ruel, for any balance or amount due to the plaintiffs in respect of the said agreement between the said James Packer and the plaintiffs during the said term of three years: And by the said agreement it was declared by the said N. C. Sendall, G. Theobald, J. G. Antrobus, the defendant, and H. W. Ruel, that giving time to the said James Packer by the plaintiffs for the payment of any account or balance at any time should not invalidate the said guarantee, but that they should at all times have it in their full power and discretion so to do, or to make any compromise or arrangement that they might deem beneficial with the said James Packer, and that they the said N. C. Sendall, G. Theobald, J. G. Antrobus, the defendant, and H. W. Ruel, their executors or administrators, should remain liable to make good any balance or sum remaining due from the said James Packer to the said plaintiffs, notwithstanding such time so given or such compromise or arrangement as aforesaid; and, further, that, as between them the said N. C. Sendall, G. Theobald, J. G. Antrobus, the defendant, and H. W. Ruel and the plaintiffs, any accounts stated between them and the said James Packer, or the account-books of the latter used by them in their regular course of business, should be *taken as conclusive evidence against the said N. C. Sendall, G. Theobald, J. G. Antrobus, the defendant, and H. W. Ruel, their executors or administrators, either at law or in equity, of the amount of balance or balances due to them on the said agreement by the said James Packer: And it was by the said agreement further agreed and declared by and between the said parties thereto, that the said agreement was to be taken and considered as supplemental and in addition to an agreement bearing date the 1st of November, 1856, made between Sarah Tinson of the one part, and the plaintiffs and their late partner of the other part: Averment, that the plaintiffs, confiding in the said promise and agreement of the defendant, for more than one calendar month after the making of the said agreement did continue and agree to allow to the said James Packer the said commission upon the sale of the said coals referred to in the said agreement between the said James Packer and the plaintiffs, and did not, during or in the said month terminate or put an end to the said last mentioned agreement, as they might have done; and that afterwards, and within the said term of three years, there became due and payable and owing in relation to and respect of the said agreement, from the said James Packer to the plaintiffs a large sum of money, such sum being due and payable as aforesaid by the said James Packer in respect of the said coal account; that the defendant's said proportion of the said sum of money amounted to a large sum of money; that, before and at the time of the making of the said promise by the defendant, and from thence and during all the time aforesaid, the plaintiffs had the power to terminate and put an end to the said agreement between them and the plaintiffs and the said James

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Packer by the said plaintiffs, giving one month's notice to the said James Packer of *their, the plaintiff's desire to terminate and put an end to the same; that, before the commencement of this [*390 suit, all things had happened and occurred and all times had elapsed which it was necessary should occur, happen, and elapse to entitle the plaintiff to sue in this action for the defendant's breach hereinafter mentioned of the said promise; and that the plaintiffs had always been ready and willing to do all things which it was necessary they should be ready and willing to do to entitle them to sue the defendant in this action for the said breach of promise, and nothing had happened or occurred to prevent the plaintiffs suing in this action for the said breach of promise; yet that the defendant broke his said promise, and had not paid or made good to the plaintiffs the said proportion of the said sum of money so due and owing as aforesaid from the said James Packer to the plaintiffs, which he the defendant agreed to pay and make good by his said promise, or any part thereof; whereby the said sum and every part thereof became wholly lost to the plaintiffs.

The defendant pleaded,—first, that he did not agree as alleged,—secondly, that the supposed agreement and promise was obtained from him by the plaintiffs by the fraud of the plaintiffs, and by their fraudulent and undue concealment of material facts within their knowledge respecting the said James Packer, material to be made known by them to the defendant before he entered into the said agreement. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Michaelmas Term. The facts which appeared in evidence were as follows:—One James Packer had been employed by the plaintiffs to sell coals for them on commission, under an agreement bearing date the 1st of November, 1856, under which he was to give his acceptances for the *amount of all coals sold by him each [*391 month, and to account for and pay over to the plaintiffs as their agent all the moneys received by him, within six days after the receipt thereof by him: and for the due performance of that agreement one Sarah Tinson entered into a guarantee to the extent of 300*l.*, terminable on one month's notice. Packer continued in the employment of the plaintiffs down to the month of September, 1861. At this time he was in arrear with his payments to the extent of 1272*l.*; and, the plaintiffs requiring further security, he procured the defendant and the other persons named in the agreement set out in the declaration to give their guarantee, each for the sum set opposite to his name therein. In July, 1862, Packer was dismissed, and the sureties were called upon to pay, *being then for the first time informed of the fact of Packer being at the time the guarantee was given so largely indebted to the plaintiffs.*

On the part of the defendant, it was submitted that the concealment of this fact was a fraud upon the sureties; and the case of Railton *v.* Mathews, 10 Clark & Fin. 934, was relied on. There, a party became surety in a bond for the fidelity of a commission-agent to his employers. After some time the employers discovered irregularities in the agent's accounts, and put the bond in suit. The surety then instituted

a suit to avoid the bond, on the ground of concealment by the employers of material circumstances affecting the agent's credit prior to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding judge directed the jury that the concealment, to be
*392] undue, must be *wilful and intentional* with a view to the *advantages the employers were thereby to gain: and it was held by the House of Lords,—reversing the judgment of the Court of Session in Scotland,—that the direction was wrong in point of law; for that the mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself.

For the plaintiffs, it was contended that there was *no* evidence to go to the jury in support of the plea of fraud.

The Lord Chief Justice ruled that there was; and he left it to the jury to say whether the plaintiff misled the defendant by concealing from him a fact respecting Packer's antecedents which it was material to him to know,—was the face of the instrument in fact a misleading? —was it fraud on the plaintiffs' part to keep back the knowledge of the fact that so large a sum as 1272*l.* was at the time in arrear from Packer?

In the course of the plaintiffs' case, *Collier*, Q. C., proposed to prove that Packer had been dismissed for fraud; but this evidence, being objected to by *O'Malley*, Q. C., for the defendant, was not allowed to be gone into.

A verdict having been found for the defendant,

Collier, Q. C., in Hilary Term last, moved to enter a verdict for the plaintiffs, pursuant to leave reserved to him, or for a new trial, on the ground of misdirection. The case of Railton *v.* Mathews is very much qualified by a subsequent case in the House of Lords, Hamilton *v.* Watson, 12 Clark & Fin. 109, where it was held that a surety is not of necessity entitled to receive, without injury, from the party to whom he is about to bind himself, a full disclosure of all the cir-
*393] cumstances of the *dealings between the principal and that party. If he requires to know any particular matter of which the party about to receive the security is informed, he must make it the subject of a distinct inquiry. The case has also been the subject of comment in a recent case in the Exchequer,—The North British Insurance Company *v.* Lloyd, 10 Exch. 523,—where it is laid down that the rule which prevails in insurances upon ships and lives, that all material circumstances known to the assured must be disclosed, though there be no fraud in the concealment, does not extend to the case of guarantees; but that, in the latter case, the concealment, to vitiate the guarantee, must be *fraudulent*. There was no evidence of fraud here. It did not even appear that the moneys had been received by Packer from the customers. His lordship should have left it to the jury to say whether there was a fraudulent concealment of a fact which the plaintiffs were bound to communicate. A plea in the

terms of the direction here given would clearly have been a bad plea. [ERLE, C. J.—Would either of these persons have consented to become surety for Packer if the plaintiffs had communicated to them the fact that he owed them 1272*l.*?] Possibly not. There was no fraud or misrepresentation, no active misleading. It did not even appear that there had been any personal communication between the plaintiffs and the sureties. [KEATING, J.—If Packer had been guilty of embezzlement, and that fact had not been communicated to the defendant, would that have amounted to a fraudulent concealment?] That would present more difficulty.

WILLIAMS, J.—We are all of opinion that there was no misdirection in this case. What my Lord ruled, in substance, was, that, if the jury found the existence of certain facts which would in law amount to a fraud, *the plea was made out. There is nothing wrong in that. Some members of the court, however, entertain some doubt whether there were materials for the summing-up,—whether there was evidence of any active misleading. Upon that, therefore, the rule may go. [*394

O'Malley, Q. C., and *Sir G. Honyman*, showed cause.—From the frame of the document which he was called upon to sign, the surety would be naturally led to suppose that he was guaranteeing prospective dealings and balances. He never would have entered into the engagement if he had been told that Packer was already hopelessly involved. The non-communication of the fact was not a mere concealment; the statement in the agreement was a palpable misrepresentation, an active misleading, and a fraud. The jury had a right to draw their own conclusions from the recitals. These clearly contemplate a liability for future accounts only, whatever may be the legal interpretation of the operative part of the instrument. [WILLES, J.—Was anything in arrear on the debts contracted since the date of the agreement?] That did not appear; though there was evidence that the debt had been decreased by 60*l.* at the termination of the engagement. It may be, as was held in The North British Insurance Company *v.* Lloyd, 10 Exch. 523, that the rule which prevails in insurance law as to the concealment of material facts, is inapplicable to cases of suretyship.(*a*) But here was a wilful concealment with a view to the plaintiffs' own advantage, which brings the case clearly within the principle of Railton *v.* Mathews, 10 Clark & Fin. 934. [BYLES, J.—The plaintiffs had no right for a fraudulent purpose to abstain from communicating the fact of Packer's prior indebtedness.] The only question is, whether the *concealment of that fact was any evidence of fraud. [KEATING, J.—Or, whether the recitals in the agreement amount to a misrepresentation of the real state of facts. ERLE, C. J.—Suppose the plaintiffs had called upon the defendant for the 100*l.* the day after execution of the agreement,—would it not have been competent to the surety to say that he had been misled?] No doubt it would. [*395

Collier, Q. C., in support of his rule.—The question is, whether the mere fact of the non-communication of the state of accounts between the plaintiffs and Packer, no inquiry having been made on the subject, could properly be left to the jury as evidence of fraud. Hamil-

(*a*) See Way *v.* Hearne, 13 C. B. N. S. 292 (E. C. L. R. vol. 106)

ton v. Watson,—which Parke, B., in The North British Insurance Company v. Lloyd, treats as inconsistent with the earlier case of Railton v. Mathews.—is precisely in point. Lord Campbell there says (12 Clark & Fin. 118): "Your Lordships must particularly notice what the nature of the contract is. It is suretyship upon a cash account. Now, the question is, what, upon entering into such a contract, ought to be disclosed? And I will venture to say, if your Lordships were to adopt the principles laid down and contended for by the appellants' counsel here, that you would entirely knock up those transactions in Scotland of giving security upon a cash account, because no bankers would rest satisfied that they had a security for the advance they made, if, as is contended, it is essentially necessary that everything should be disclosed by the creditor that is material for the surety to know. If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given, to state how the account has been kept,—whether the debtor was in the habit of over-
*396] drawing,—whether he was punctual in his dealings,—*whether he performed his promises in an honourable manner: for, all these things are extremely material for the surety to know. But, unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor to whom the suretyship is to be given, to make any such disclosure: and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But, if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires." [KEATING, J.—Is there any case of a concealment by the creditor of a material circumstance where he has professed to make a communication of all facts?] No. The very fact of the plaintiffs requiring security, shows that they were not satisfied with Packer. The defendant has notice of the existing agreement, and it is in part recited. He might have inquired how that agreement had been carried out. [BYLES, J., referred to Owen v. Homan, 4 House of Lords Cases 997.] The simple question here is, did the non-communication of the existence of the debt, without any fraud on the plaintiffs' part, and without any knowledge by them that Packer had been guilty of embezzlement, vitiate this contract?

*397] ERLE, C. J.—This is an action against a surety upon *a contract of suretyship; and the question is whether that contract has been avoided by reason of fraud. The jury have found that it was: and the question for us to decide, is, whether there was any evidence of fraud which could properly be left to them. I think there was. It appeared that Packer had been for some years in the employ of the plaintiffs, selling coals for them on commission, and that at the time the defendant and the other persons were induced to become sureties for the due payment of moneys to be received by him on

account of such sales, he was already a defaulter to the extent of 1272*l.* The agreement of suretyship contains a recital that "James Packer has for some time past been a salesman of coals upon commission for Messrs. Lee, he the said James Packer giving bills of exchange to the said Messrs. Lee for all such coals as may be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills are respectively running." There was nothing in this recital that was at all calculated to induce the defendant to make inquiry: and certainly, if he had known that Packer already owed the plaintiffs so much money, he would not have consented to become surety for him. It is clear to my mind that the plaintiffs misled the defendant by not informing him of the state of the account between them and Packer, and by inducing him to believe that he was only guaranteeing future accounts. There was abundant evidence for the jury in support of the plea of fraud.

WILLES, J., concurred.

BYLES, J.—The question for us is, not whether the jury came to a right conclusion, but whether there *was any evidence before them to warrant their finding a verdict for the defendant. I [*398 think the recitals in the agreement in question were eminently calculated to mislead, and were pregnant with the assertion that Packer had faithfully performed his duty up to the time at which that agreement was entered into.

KEATING, J.—I am of the same opinion. It seems to me that there was evidence which my Lord was bound to leave to the jury in support of the plea of fraud. Under the circumstances, I think the recitals in the agreement amounted to an active misrepresentation.

Rule discharged.

SMITH *v.* HOWDEN and Another. *April* 20.

A. was possessed of a close the only way to which was along a green lane between two other closes, one of which belonged to A. and the other to B. In the absence of any direct evidence of ownership, the jury were told that they might presume the soil of the lane to belong in moieties to the owners of the adjoining closes, and that, in respect of the close at the end of the lane, A. had a mere easement:—Held, a proper direction.

THIS was an action of trespass brought to try the right to the soil of a strip of land about sixty yards in length, lying between two fields, the one belonging to the plaintiff, the other to the defendant Howden.

The cause was tried before Crompton J., at the last Assizes at Hereford. It appeared that the strip of land in question was a sort of occupation-road, and the only way leading to a close called Copner's Close, which was part of the Mason Court estate belonging to the defendant Howden. There was no evidence of any user of the road in question except as a way to Copner's Close, and except that the plaintiff about eighteen years ago placed a gate across it. On the defendant's side of the road was a watercourse, which *the jury [*399 negatived as the boundary between the two properties. The defendants had obstructed this way by digging a trench across it.

The learned judge told the jury that it was incumbent on the plaintiff

to show that he was entitled either to the whole or the half of the strip of land in question; that, in the absence of evidence to the contrary, the presumption of law is, that, where a road lies between the lands of A. and B., the soil thereof belongs to each up to the centre of the road; and that the owner of the close at the end of this road had a mere easement,—a right of passing and repassing along it to reach his close.

The jury, after much difficulty, came to the conclusion that each party was entitled to half the way, and returned a verdict for the plaintiff accordingly.

Pigott, Serjt., now moved for a new trial, on the ground of misdirection.—He submitted, that, there being no evidence that any person other than the owner of Copner's Close ever had used or could use the road in question, the ordinary presumption did not arise. [WILLES, J., referred to Holmes *v.* Bellingham, 7 C. B. N. S. 329 (E. C. L. R. vol. 97).] Without at all disputing the principle of that case, it is submitted that the learned judge ought to have left it to the jury to say whether, in the absence of any evidence of right in the plaintiff, they would not presume the ownership of the soil to be in the proprietor of Copner's Close, by whom alone it was used. [ERLE, C. J.—Why should the learned judge ask the jury to consider whether the soil of the road might not belong to the owner of Copner's Close, when there was no evidence whatever to show that he had more than easement?] In Grose *v.* West, 7 Taunt. 39 (E. C. L. R. vol. 2), Gibbs, C. J., says: "Primâ facie, the presumption is, that a strip of land lying between a highway and the *adjoining close belongs to the owner of the close; as the presumption also is, that the highway itself ad medium filum viæ does. But the presumption is to be confined to that extent; for, if the narrow strip be contiguous to or communicate with open commons or larger portions of land, the presumption is either done away or considerably narrowed; for, the evidence of ownership which applies to the larger portions applies also to the narrow strip which communicates with them." So, here, the primâ facie presumption that the road in question belongs in moieties to the owners of the enclosed land on either side, is either done away or considerably narrowed by the fact that the road is only used by the owner of Copner's Close for the purpose of gaining access to that close. [ERLE, C. J.—Grose *v.* West applies only to the case of a claim by the lord of the manor.]

*400]

ERLE, C. J.—The question in this case was, who was the owner of a close which I will call a green lane, the plaintiff's enclosure abutting upon it on one side and the defendant's close on the other side, and it being subject to a private right of way to another close called Copner's Close, belonging to the defendant Howden. The jury have found that it belonged to each ad medium filum viæ. My Brother Pigott contends that the learned judge misdirected the jury, because he omitted to leave it to them to say whether the soil of this lane did not belong to the owner of Copner's Close, it being a lane or way leading only to that close, and used only by the occupier of that close. The nature of the road, coupled with the fact I have mentioned, constitute no evidence that the ownership of the soil was in the owner of Copner's Close. The defendant showed no more than an easement in

respect of that close: the mere passing up and down it *clearly raises no presumption of ownership. I think the law was well laid down by this court in the case of Holmes *v.* Bellingham, 7 C. B. N. S. 329 (E. C. L. R. vol. 97). In that case I could find no fact that was indicative of exclusive ownership in either party, neither having done anything more than pass up and down the road; and I left it to the jury to say whether the fair presumption was not, that each was entitled to half: the jury found that it was; and that was the opinion of the court. I think there should be no rule. [*401

WILLES, J.—I am of the same opinion. It may be that the jury in this case have misapplied the rule laid down by this court, but not in favour of the defendants. I cannot help thinking they might well have held the watercourse to be the true boundary line between the two properties. But, at all events they must be taken to have found that there was no evidence that the soil of the road in question belonged to the owner of Copner's Close.

The rest of the court concurring, Rule refused.

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*PERRY, Assignee, &c., *v.* BENNETT. *May* 6. [*402

The 7th of the directions to the taxing masters, of Hilary Term, 1853, does not apply to an action commenced in a county-court, and removed by certiorari to a superior court.

The plaintiff in such a case, therefore, is entitled to costs on the higher scale, though he recovers less than 20*l.*

A PLAINT having been levied in the county-court of Ramsgate for money had and received, the defendant, upon a suggestion that difficult questions of law were likely to arise on the trial, obtained a certiorari to remove it into this court. The cause was tried before Byles, J., when a verdict was found for the plaintiff for 12*l.* 12*s.* 6*d.*, and the learned judge certified for costs generally.

On taxation, the Master, conceiving that the case fell within the 7th of the Directions to Taxing Masters, of Hilary Term, 1853,—which provides, that, "in all actions on contracts, other than cases wherein by reason of the nature of the action no writ of trial can by law be issued, where the sum recovered or paid into court and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.* (without costs), the plaintiff's costs as against the defendant shall be taxed according to the lower scale of allowances in the schedule of costs hereunto annexed: provided that, in case of trial before a judge of one of the superior courts, or judge of assize, if the judge shall certify on the postea that the cause was proper to be tried before him, and not before a sheriff or judge of an inferior court, the costs shall be taxed on the higher scale,"—taxed the plaintiff's costs according to the lower scale, notwithstanding it was contended on his part that the above rule did not apply to such a case.

Tindal Atkinson, on a former day in this term, obtained a rule calling upon the defendant to show cause why the Master should not be at liberty to review his taxation.

*403] *Barnard* now showed cause.—The Master was quite right in taxing the costs on the lower scale, there being no certificate to justify a taxation upon the higher. The words of the rule, which was founded upon the 3 & 4 W. 4, c. 42, s. 17, are perfectly plain,—"In all actions on contract, other than cases wherein by reason of the nature of the action no writ of trial can by law be issued, where the sum recovered, &c., shall not exceed 20*l.*," the plaintiff's costs shall be taxed according to the lower scale. This is not a case within the exception: the action is of such a nature,—indebitatus assumpsit for a money demand,—that a writ of trial might have issued if the action had been commenced in the superior court. If any difficulty has arisen, it has arisen from the plaintiff's own default: if he had attended before the judge when the certiorari was applied for, possibly special terms might have been inserted in the order in his favour.

Atkinson was not called upon.

ERLE, C. J.—I am of opinion that Mr. Atkinson is entitled to have his rule made absolute. The plaintiff commenced his action in indebitatus assumpsit for money by plaint in the Ramsgate county court. The defendant obtained a certiorari to remove it into this court; and on the trial the plaintiff obtained a verdict for less than 20*l.* The Master has taxed the plaintiff's costs upon the lower scale. The words of the rule upon which the Master acted are,—"In all actions on contract, *other than cases wherein by reason of the nature of the action no writ of trial can by law be issued*, where the sum recovered, &c., shall not exceed 20*l.* (without costs), the plaintiff's costs as against the defendant shall be taxed according to the lower scale of allowances in the schedule of costs hereunto annexed."

*404] *If the words "the nature of the action" there mean what Mr. Barnard suggests, undoubtedly this action was of such a nature that a writ of trial might have been issued. But I think those words mean, that, where the incidents of the action are such that a writ of trial could not be ordered, the case shall fall within the exception. The rule dates its origin from the 17th section of the 3 & 4 W. 4, c. 42, which enacts, that, "in any action *depending in any of the superior courts* for any debt or demand in which the sum sought to be recovered, and *endorsed on the writ of summons*, shall not exceed 20*l.*, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county; and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues by a jury to be summoned by him, and to return such writ, with the finding of the jury thereon endorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such issue or issues." The power to order a writ of trial to issue, therefore, is confined to cases where the sum sought to be recovered, and *endorsed upon the writ of summons*, does not exceed 20*l.*

Here, the nature of the action was such that there could be no endorsement on the writ of summons, because no writ of summons existed. The plaintiff commenced his action by plaint in the county court. The case, therefore, does not fall within the words of the rule, which never was intended to apply to it.

*WILLES, J.—I am of the same opinion. The rule in question applies to a case where the plaintiff has brought his action [*405 in the superior court to recover a debt or demand not exceeding 20*l.* If the framers of those directions had meant otherwise, they would have said, not "other than cases wherein by reason of the nature of the action no writ of trial can by law be issued;" but "wherein by reason of the *cause* of action," &c.

The rest of the court concurring, Rule absolute.(*a*)

(*a*) See Walther *v.* Mess, 7 Q. B. 189 (E. C. L. R. vol. 53), 2 D. & L. 961.

In re DAVID NEWBOLD and THE METROPOLITAN RAILWAY COMPANY. *May* 8.

The award of arbitrators or an umpire upon a claim for compensation for lands injuriously affected by the works of a company, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), like the assessment of a compensation jury, merely ascertains the amount, not the claimant's right to compensation.

Such an award, therefore, cannot be enforced by motion, like an ordinary award.

And, *semble*, that it is not competent to the arbitrators or umpire to state facts for the opinion of the court as upon a special case.

MR. NEWBOLD, being possessed of a term of years in certain premises in the Euston Road, in the county of Middlesex, wherein he carried on the business of a zinc-manufacturer, on the 7th of September, 1861, gave notice to the Metropolitan Railway Company that his premises were injuriously affected by the execution of works authorized by the company's acts,—17 & 18 Vict. c. ccxxi., 18 & 19 Vict. c. cii., 19 & 20 Vict. c. cix., 20 & 21 Vict. c. cxxv., 22 & 23 Vict. c. xcvii., and 23 & 24 Vict. c. lviii.,—some or one of them, and claimed 500*l.* *compensation, and gave notice that he required [*406 such claim to be settled by arbitration under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). On the 2d of October, he gave the company notice that he appointed Mr. Joseph Lavender, architect and surveyor, to be arbitrator on his part. On the 16th of October, the company (under protest) appointed Mr. R. A. Withall, surveyor, to be the arbitrator on their behalf.

The arbitrators not agreeing, and having appointed Mr. Serjt. Hayes as umpire, that learned gentleman on the 30th of October, 1862, made his award, which, after reciting that "by virtue of The Metropolitan Railway Act, 1854 (17 & 18 Vict. c. ccxxi.), The Metropolitan Railway Deviation Act, 1855 (18 & 19 Vict. c. cii.), The Metropolitan Railway (Great Northern Branch and Amendment) Act, 1856 (19 & 20 Vict. c. cix.), The Metropolitan Railway Amendment Act, 1857 (20 & 21 Vict. c. cxxv.), The Metropolitan Railway Amendment Act, 1859 (22 & 23 Vict. c. xcvii.), and The Metropolitan Railway Amendment Act, 1860 (23 & 24 Vict. c. lviii.), The Metropolitan Railway Company were authorized to take lands and execute works for the

construction of a certain railway therein mentioned, pursuant to the provisions of the said several acts of parliament and the provisions of the Lands Clauses Consolidation Act, 1848 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), which were incorporated therewith," and further reciting the claim of compensation, and the appointment of the arbitrators, proceeded as follows:—

"And whereas the said arbitrators, before entering upon the matters referred to them, did by writing under their hands nominate me the undersigned George Hayes, serjeant-at-law, to be their umpire in the matter of the said arbitration, according to the provisions
*407] of the Lands Clauses Consolidation Act, *1845, in that behalf: And whereas the said arbitrators did several times by writing under their hands enlarge the time for making their award; but ultimately they differed upon the matters submitted to them, and the said arbitration consequently devolved upon me as umpire as aforesaid: And whereas I the said umpire took on myself the burthen of the said reference and umpirage, and the respective parties by their counsel and attorneys did attend before me on the 20th and 22d days of August last, and submitted their respective cases and evidence for my determination; and on the last of the said days the said respective parties did by their counsel and agents in that behalf consent and agree that I should have full power to make my award and umpirage in the matter of the said arbitration until the 1st day of November next: Now, therefore, I the said umpire, having, before entering upon and taking into consideration the matter of the said reference, duly made and subscribed, in the presence of a justice authorized in that behalf, the declaration required by law in that behalf, and hereunto annexed, and having been so attended by the said respective parties and their witnesses, and having duly considered their respective allegations and proofs, do make this my award and umpirage of and concerning the premises, in manner following, that is to say,—I find and award that a part of the premises mentioned in the notice of the said David Newbold of the 7th of September, 1861, in which he was interested as therein mentioned, being a certain shop in front and forming part of his house and premises No. 94, Euston Road, was injuriously affected by the execution of the works of the said company, the foundations, side walls, and roof of the same having been cracked and otherwise damaged from settlements occasioned by the execution of the works of the said company;
*408] and I find and *award that the amount of the damage and injury to the said premises so caused by such cracks and settlements is the sum of 50*l.*: And I further find and state that the said shop so injured as aforesaid was and is a building which was erected after the passing of an act made in the seventh year of the reign of King George the Fourth (c. cxlii.) intituled 'An act for consolidating the trusts of the several turnpike-roads in the neighbourhood of the Metropolis north of the River Thames,' and was erected upon a foundation which at the time of such erection was a new foundation, and also that the same was and is erected upon land adjacent to the road described in the 140th section of the said act as the road leading from the Edgware Road, near Paddington, to the Great Northern

Road in Islington, and was and is erected within fifty feet from the side of such road, and was not erected as or for a toll-house or watch-house by virtue of the said act, nor was the same erected on any part of the north side of the road extending from Maiden Lane to the Bell Gate in Battle Bridge in the 140th section of the said act mentioned, but which section was repealed by the 75th section of the said act of the 25 & 26 Vict. c. 102, intituled 'An act to amend the Metropolis Local Management Acts,' which was passed on the 7th of August, 1862, being after the said house and premises had been injuriously affected as aforesaid, and after the said claim had been made and submitted to arbitration as aforesaid, but before the same came on to he heard before me: And I further find and award, that, by reason of the said company having in the execution of their works, and in pursuance of the special powers given by the said acts, stopped up the carriage-way of that part of the Euston Road which is in front of the said premises of the said David Newbold, and having kept the same so stopped up for *three months or thereabouts, in the year [*409
1861, and also by reason of a slip in their excavation in the said carriage-way near to the said premises of the said David Newbold, which occasioned an obstruction in the foot-pavement of the said Euston Road near to but not opposite the premises of the said David Newbold, the access of carts and carriages to the said premises of the said David Newbold was prevented, and the access of foot-passengers to the said premises was to some extent impeded during the execution of the said works in front of his premises; and that by means thereof the said premises were during such time rendered less advantageous and convenient for business purposes than they otherwise would have been, and the business and custom of the said David Newbold in his trade of a zinc-manufacturer carried on by him in his said house and shop was diminished: And I find and award, that, by reason of the premises last aforesaid, the said house and shop of the said David Newbold were injuriously affected during the time and by reason of such obstruction and impediment so caused by the execution of the works of the said company, to the extent of 40*l.*: And I assess the amount of compensation to be paid by the said company to the said David Newbold in respect of his premises having been so injuriously affected as aforesaid at the sums of 50*l.* and 40*l.* in respect of the said different modes of injury, and making together the sum of 90*l.* In witness," &c.

F. Russell, on a former day, obtained a rule under the 1 & 2 Vict. c. 110, calling upon the company to show cause why they should not pay to Mr. Newbold the two sums awarded to him.

Horace Lloyd (with whom was *Hawkins*, Q. C.), now *showed [*410
cause.—An award under the Lands Clauses Consolidation Act cannot be enforced in this way. It merely, like the verdict of a jury, assesses the amount: The Queen *v.* The London and North-Western Railway Company, 3 Ellis & B. 443 (E. C. L. R. vol. 77). [WILLES, J.—If there is a question of right to be determined.] The award presents two important and difficult questions of law,—first, whether the claimant is entitled to compensation for loss of business by means of the decrease of traffic in a thoroughfare,—secondly, whether the company can be liable for an interference with the enjoyment by the

claimant of that which an act of parliament has declared to be a public nuisance. The first of these points is now on its way to a court of error. In Chamberlain *v.* The West End of London Railway Company, 31 Law J. Q. B. 201, the question was raised by action.

Petersdorff, Serjt., and *F. Russell*, in support of the rule.—The umpire has stated on the face of his award the circumstances under which the claim is made, for the opinion of the court, as on a special case under the 5th section of the Common Law Procedure Act, 1854. [ERLE, C. J.—This might be a convenient course if the decision of this court could be carried to a court of error. I believe that we are all of opinion that the award of an arbitrator or umpire stands in this respect in pari jure with the assessment of a compensation jury. WILLES, J.—This is a compulsory reference under the Lands Clauses Consolidation Act, 1845. The 5th section of the Common Law Procedure Act, 1854, does not apply to such a case. The umpire had no right to state facts for the opinion of the court.] Then, that part of the award may be treated as surplusage. [ERLE, C. J.—The award *411] is good enough for the purpose of assessing the amount, *provided the claimant on the trial of an action shows that his right has been injuriously affected by the works of the company. All the law about awards, and the mode of enforcing them, has nothing to do with the question.] Why should the 8 & 9 Vict. c. 18, s. 36, provide that "the submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties," unless it was for the purpose of enabling the claimant to enforce it by motion?

ERLE, C. J.—As at present advised, I think the award of arbitrators or an umpire under this act stands in the same position as the assessment of damages by a compensation jury.

WILLES, J.—I am of the same opinion, although if there had been no substantial question to be decided, I should have been strongly inclined to make the rule absolute.

BYLES, J.—I should have been very glad if we could consistently have made this rule absolute, the amount in contest being so small. But this case must be governed by the same rule as if the amount at stake were half a million of money.

KEATING J., concurred. Rule discharged.

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*412] *CAMPBELL *v.* THE MERSEY DOCKS AND HARBOUR BOARD. *April* 21.

A sale of a given number of bales out of a larger number does not vest the property in the vendee, until there has been a specific appropriation by the vendor assented to by the vendee or his agent.

A. bought 250 bales of cotton, part of a cargo of 500 (of one mark) landed and warehoused in the Mersey Docks. On landing, the bales were sampled and numbered, and a warrant was handed by the company to A. for 250 bales "numbered from 1 to 250," as having been entered for him:—Held, that, assuming this to have been an appropriation of the specific bales to A., there having been no assent by him to such appropriation, express or implied, no property passed to him.

THIS was an action brought by the plaintiff to recover the value of

250 bales of Surat cotton alleged to be the property of the plaintiff, and to have been converted by the defendants under the following circumstances:—

A cargo of cotton ex Bosphorus, consisting of 500 bales, arrived in one of the company's docks early in September, 1862. The plaintiff was the broker for the goods, and had himself bought 250 bales, and had sold the rest to other parties. The landing commenced on the 8th, and was continued on the 9th and 10th, when the whole were landed. All had one mark, but no numbers; the numbers being affixed by the company's officers at the time of landing and weighing. The course of business was, for the broker to take a sample from each bale, and to submit the samples to the inspection of two indifferent brokers, and on their fiat the contracts were affirmed or disaffirmed. On the present occasion the contracts were affirmed. On the 13th of September, a warrant or certificate of warehousing, pursuant to the 228th section of the company's act (20 & 21 Vict. c. clxii.), was sent to the plaintiff for 250 bales described as being numbered from 1 to 250, and as "entered by J. P. Campbell on the 10th of September, 1862; rent payable from the 15th of September." The plaintiff thereupon paid for the 250 bales, getting the warrant endorsed to him, with a delivery order "for the above-mentioned goods," dated the 15th of September. On the 7th of October, the plaintiff re-sold the cotton, and sent the warrant, endorsed, with a delivery order for the cotton therein mentioned. The buyer repudiated the contract, on the ground that the cotton did not correspond with *the samples; and then, upon the plaintiff demanding back the warrant, [*413 the company's officers for the first time informed him that 200 of the bales numbered 1 to 250 had been inadvertently delivered on the 11th and 13th of September to other persons; and they offered him a fresh warrant for other numbers. The plaintiff, however, declined to accept it, and brought this action.

At the trial, before Keating J., at the last Assizes at Liverpool, it was insisted on the part of the plaintiff that the bales mentioned in the warrant were so ear-marked and appropriated to him by the act of the company as to vest the property in him as from the 10th of September.

On the other hand, it was submitted that the mere act of appropriation by the company of 250 out of a larger number of bales was not sufficient to vest the property in the specific bales in the plaintiff without an assent to such appropriation on his part.

To this latter argument the learned judge inclined, and he directed the jury accordingly.

One of the jury asked his lordship whether the endorsement of the warrant by the plaintiff did not amount to an assent on his part to the appropriation. The learned judge said it was not conclusive; but that it was open to the company to show that the appropriation was a mistake on the part of one of their clerks.

A verdict having been found for the defendants,

Edward James, Q. C. (with whom was *J. A. Russell*), moved for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence. He submitted that by the entry in the plaintiff's name and the warrant or certificate of warehousing there

was a complete appropriation of the bales numbered 1 to 250 to the plaintiff, and that no assent on his part was necessary to vest the property in those specific *bales in him; and that, if any assent was necessary, there was abundant evidence that such assent was given; and consequently that the defendants could not discharge their duty by the delivery of any others.

*414]

ERLE, C. J.—I am of opinion that there should be no rule in this case. This was an action for the alleged conversion by the defendants of 250 bales of cotton out of a cargo consisting of 500 bales; and the question is whether or not the property in those 250 bales ever vested in the plaintiff. For the affirmative of that proposition, the plaintiff relies on a delivery order from the vendors and the fact that the defendants by their warrant or certificate of warehousing had specifically appropriated to him the bales ex Bosphorus numbered from 1 to 250. If there was no appropriation by the company to the plaintiff of the specific numbers, his case entirely fails. There certainly was some evidence of appropriation; and the question left to the jury upon that was, whether the evidence of that appropriation did not arise from a mistake on the part of the company's clerk. The learned judge is not dissatisfied with the finding of the jury upon that question. Then it is said that the learned judge misdirected the jury in telling them that the mere act of appropriation by the company would not vest the property in the plaintiff, unless he had assented to that appropriation. If there was no appropriation, this point becomes immaterial. But, if it be material, I venture to say that the law as laid down by the learned judge was well laid down. It has been established by a long series of cases,—of which it will be enough to refer to Hanson *v.* Meyer, 6 East 614, Rugg *v.* Minett, 11 East 210, and Rhode *v.* Thwaites, 6 B. & C. 688 (E. C. L. R. vol. 13), 9 D. & R. 293,—that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there *has been a separation and an appropriation assented to both by vendor and vendee. Nothing passes until there is an assent express or implied on the part of the vendee. The warehouseman may in some cases be the agent of the vendee for the purpose of such assent: but nothing passes until there has been a separation and an appropriation assented to.

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WILLES, J.—I am entirely of the same opinion. The real question was, whether the appropriation of numbers 1 to 250 was not a mistake. The jury found in substance that it was. No property in the goods therefore ever vested in the plaintiff. Mr. James complains of the alternative which was put,—assuming that there was an appropriation, was that appropriation assented to by the plaintiff? The cases to which my Lord has referred show what the law on the subject is. And perhaps the case of Godts *v.* Rose, 17 C. B. 229 (E. C. L. R. vol. 84), is even more in point to show that there must not only be an appropriation, but an appropriation assented to by the vendee.(*a*) The

(*a*) There, A., having a quantity of rape-oil at Humphrey's wharf, contracted to sell five tons thereof to B. The bought-note was as follows:—"Bought for account of B., of Mr. A., five tons of first quality foreign refined rape-oil, at 53*s.* per cwt.; usual allowances: to be free delivered and paid for in fourteen days in cash less 2½ per cent. discount." A. sent an order to the wharf directing the wharfinger to transfer into B.'s name five tons of the oil; and the wharfinger's clerk made the usual entry in his book, and gave A.'s clerk a transfer order addressed to B., acknowledging to hold the five tons for him. A.'s clerk took the invoice and transfer

assent of the vendee may be given *prior to the appropriation [*416
by the vendor: it may be either express or implied; and it may be given by an agent of the party,—by the warehouseman or wharfinger, for instance. In stating the proposition as he did, I think my Brother Keating stated a proposition which is in strict accordance with law.

BYLES, J., concurred. Rule refused.

order to B.'s counting-house, and offered them to him, at the same time demanding a check for the amount. B., without (as the jury found) the consent of A.'s clerk, took the transfer order, but refused to give a check. The clerk thereupon returned to the wharf and gave notice to the wharfinger not to deliver the oil to B. In defiance, however, of this notice, the oil was afterwards delivered. In trover by A. against B. for the oil and the transfer order, it was held, that, under the circumstances, neither the property nor the right to the possession thereof passed to B.

The case of White *v.* Welsh excited, at the time it was tried, marked comment. The plaintiffs bought of the defendants, who were factors, acting for foreign principals, an ascertained quantity of sugars. It was a term of the sale that plaintiffs should have a month's storage in defendants' warehouse, rent free, and that the goods should be covered by the defendants' policies of insurance for a period of one month. The plaintiffs, acting as the owners, effected several sales of the sugars by samples, through the agency of their brokers, and the part thus sold by them was removed from the defendants' warehouse. Upon the plaintiffs' failure, the sugars were stated as a part of their assets, without objection by the defendants, who subsequently, however, asserted the right to retain the sugars on the non-payment of the notes given for the price, and converted them to their own use. In trover by the plaintiffs, the delivery of the sugars was the point in controversy, and this is a question of intention; but the eminent judge who tried the cause took the decision of this point from the jury on the ground that there was no evidence from which a delivery could be inferred, and decided himself that there had been no delivery: 2 Wright (Pa. 1861) 396.

A barge-load of hay was, in compliance with the agreement, delivered alongside of a schooner. The bales were taken at an agreed weight, and part of them had been put on board the schooner, when a fire destroyed both crafts. It was left to the jury to determine whether there was a delivery in accordance with the intention of the parties, and their finding was accepted as decisive: Bradley *v.* Wheeler, 4 Robertson (N. Y. 1866) 18. Delivery may be complete, though measurements are requisite to ascertain the price: Hyde *v.* Lathrop, 3 Tr. App. (N. Y. 1867) 320. Goods paid for in advance may be delivered to a warehouseman for the purchaser; Hunter *v.* Wright, 12 Mass. (1866) 548; McKay *v.* Hamblin, 40 Miss. (1866) 472.

WILLIAM JAMES, Appellant, JOHN DICKENSON, Respondent.
PATRICK WILLIAMS, Appellant, ROBERT WILLS, Respondent.
THOMAS LOVERING, Appellant, GEORGE LIMPANY, Respondent. *April* 29.

The Tiverton Roads Act, 1861 (24 Vict. c. xix.), comprises within the trusts eighteen several roads. The 11th section empowers the trustees to demand and take "at the several and respective toll-gates which shall be upon or on the sides of the said roads such tolls as the said trustees shall direct, not exceeding," amongst others, "for every horse drawing any cart, wagon, &c., with wheels of a less breadth than 4½ inches, the sum of *sixpence*;" and "for every horse or mule, laden or unladen, and not drawing, the sum 1½*d*." Section 13 enacts, that "*for passing and re-passing* any number of times on the same day with the same horses, beasts, or carriages liable to toll through *any* of the toll-gates to be continued or erected by virtue of this act upon any road hereinafter particularly mentioned, no more than the number of tolls hereinafter limited with reference to such road, shall be taken, that is to say,—*two* full tolls, and no more, upon the road from A. to B.; *two* full tolls, and no more, upon the road from C. to D.; *two* full tolls, and no more, upon the road from E. to F.; *one* full toll, and no more, upon *all* the other roads comprised in this act." And the 14th section enacts, that "all horses, beasts, and cattle in respect whereof the tolls hereby authorized to be taken shall have been paid at any toll-gate on the said roads or on the sides thereof, shall, upon a ticket being produced denoting such payment, be permitted, in returning through the same toll-gate, *and in going and returning through such other toll-gate* (*if any*) *as the ticket for such payment shall free*, to pass toll-free at all times on the same day:—

Held, that the 13th section does not authorize the trustees to demand *two* full tolls from a traveller passing through only *one* gate on a line of road upon which *two* full tolls are chargeable:

Held also, that, where a party has paid *one* full toll on passing through a gate, he is not chargeable with *two* full tolls on passing on the same day through another gate on another of the roads on which *two* full tolls are demandable; but that he is liable to a second *single* toll,—there being nothing on the ticket to indicate that it frees any other gate:

Held also, that a traveller who has paid *one* full toll on passing through a gate on one of the roads on which *one* full toll is payable, is not entitled to pass toll-free on the same day through a gate on another of the roads upon which *one* full toll is payable,—the one full toll being by s. 13 payable upon "*each*" of the roads comprised in the act:

Held also, that the 11th section of the local act specifically providing for progressive charges in respect of the diminished breadth of wagon wheels, virtually repeals the 7th section of the General Turnpike Act, 3 G. 4, c. 126; and, consequently, that the toll is limited to the sums mentioned in the local act.

THESE were appeals against decisions of justices, pursuant to the 20 & 21 Vict. c. 43, s. 2.

William James, of the Ashley turnpike-gate, in the parish of Tiverton, toll-collector, appeared before the *justices in petty sessions, to answer the information of John Dickenson, of Ashley, clerk, charging that the said William James, on the 12th of January, 1863, at the Ashley turnpike-gate, in the parish of Tiverton, did unlawfully demand and take from the said John Dickenson as and for the turnpike-toll for one horse then and there being ridden by him through the said gate, the sum of 3*d*., being more than the toll then due for the same.

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The Ashley gate is situate near Tiverton, and is on the road between Tiverton and Bickleigh Bridge. This road forms a part as well of the line of road leading from the Eastern end of Broad Lane, in Tiverton, to Crediton Forches, in the parish of Crediton, as also of the road leading from Tiverton to the one-mile post from the city of Exeter near Mary Pole Head; each of these lines of road, for about three miles from Tiverton (as far as Bickleigh Bridge), being the same road. These are two of the lines of road mentioned in The Tiverton

Roads Act, 1861 (24 Vict. c. xix.), on which *two* full tolls may be taken by virtue of the 13th section of that act.

On the hearing of the information, it was proved before the said justices that the Rev. John Dickenson *resides near Ashley gate, in the parish and borough of Tiverton; that he rode on [*418 the day named in the information from his residence to the Ashley gate, and found the gate shut; that he tendered the defendant 1½*d.* as and for the turnpike toll to be paid by him for passing through the said gate with the saddle-horse he was riding; that William James demanded 3*d.* for the turnpike-toll for the same horse, which the said John Dickenson paid him before he was allowed to pass through the gate.

It was submitted by the attorney for the prosecution, that The Tiverton Roads Act, 1861, which is hereinafter referred to, and which is to form a part of this case, did not empower the collector to receive more than *one* full toll at any *one* gate erected or to be erected upon any *one* of the roads comprised in the act; that the 11th section of the act was both an enabling and restricting clause,—that it enabled the trustees to receive *one* of the tolls thereinafter mentioned and no more at any *one* gate, and that the 13th section was a restricting clause, limiting the number of tolls to be received upon *each* of the lines of road comprised in the act; and that the 11th section specified and limited the number and aggregate amount of tolls to be received at the several gates, and the 13th section the number of tolls to be received on the several lines of road.

The attorney for the defendant insisted upon his right to receive *two* full tolls at any *one or more* of the gates erected or to be erected upon either of the said lines of road upon which *two* full tolls may be taken by section 13 of the act.

After considering the above facts and arguments, and The Tiverton Roads Act, 1861, the justices adopted the view taken of it by the prosecution, and convicted the defendant in the penalty of 1*s.*, and costs 1*l.* 13*s.* 6*d.*

*At the same petty sessions, Patrick Williams, of the Horsdon turnpike-gate, in the parish and borough of Tiverton [*419 aforesaid, toll-collector, appeared before the same justices to answer the complaint of Robert Wills, of the parish of Collumpton, in the same county, charging that he the said Patrick Williams, on the 13th of January, 1863, at the Horsdon toll-gate aforesaid, in the parish and borough of Tiverton aforesaid, did unlawfully demand and receive from the said Robert Wills the sum of 1*s.* 6*d.* as and for the toll for a wagon and one horse then passing through the said gate, the said Patrick Williams not being then and there authorized or empowered to demand or take the same or any part thereof, the said Robert Wills having previously thereto, on the same day, at a certain turnpike-gate called College gate, at Collumpton aforesaid, paid the sum of 9*d.* as and for the toll for the same horse and wagon passing through the said Collumpton gate, and having then and there produced and shown to the said Patrick Williams a ticket denoting such payment.

Upon the hearing of this information it was shown that the Collumpton gate is situate on the line of road leading from the way-post in the North-East end of Leonard Moor, to the White Hart in Collump-

ton, being one of the lines of road on which, under the 13th section of the said act of parliament, *one* full toll only can be taken; and that the Horsdon gate is situate at or near Tiverton, and is on the line of road leading from Hunt's house near Lowman Bridge, in the parish of Tiverton, to a place called the White Ball, in the parish of Sampford Arundell, being one of the lines of road on which under the same section *two* full tolls may be taken; that, on the 13th of January, 1863, the said Robert Wills paid for a wagon and one horse passing through
*420] the said College gate at Collumpton *the sum of 9*d.*, and took a ticket there,—the said wagon having the fellies of the wheels thereof of less breadth than four and a half inches at the bottom or soles thereof; and that, afterwards, on the same day, he drove the same horse and wagon to the Horsdon gate, and produced to the said Patrick Williams the ticket which he had received at the said College gate at Collumpton as aforesaid, and claimed to be allowed to pass without paying any further toll; but that Patrick Williams demanded and was then paid the sum of 1*s.* 6*d.*, being two full tolls for the said wagon and one horse.

Upon this state of facts, the justices convicted the said defendant Patrick Williams, and fined him in the sum of 1*s.*, with costs 13*s.* 6*d.*

At the same petty sessions, Thomas Lovering, of the Castle toll-gate, in the parish and borough of Tiverton aforesaid, toll-collector, appeared to answer an information laid against him by George Limpany, of the parish of Oakford, in the said county, charging that the said Thomas Lovering, on the 13th of January, 1863, at the Castle gate aforesaid, in the parish and borough of Tiverton aforesaid, did unlawfully demand and take from the said George Limpany the sum of 9*d.* as and for the toll of a horse and wagon then passing through the said gate, the said George Limpany having previously, on the same day, at a certain turnpike-gate situate at Bampton, in the said county, and called the Duvale gate, paid the sum of 9*d.* as and for the toll for the same horse and wagon passing through the said Duvale gate, and having then and there produced and shown to the said Thomas Lovering a ticket denoting such payment.

Upon the hearing of this information, it was shown before the said
*421] justices that the Castle gate is situate *on the road leading from the works near the castle in the town of Tiverton, through Bolham and Cove to Bampton, and that the Duvale gate is situate on the road leading from Chapman's Bridge, by way of Duvale, into the road near Exe Bridge turnpike-gate leading towards Dulverton, being two of the roads on which, under the said 13th section of the said act of parliament, *one* full toll only can be received; that, on the 13th of January, 1863, the said George Limpany drove a wagon and one horse through the Duvale gate, for which he paid 9*d.*, and received a ticket denoting such payment,—the said wagon having the fellies of the wheels thereof of less breadth than 4½ inches at the bottom or soles thereof; that he proceeded to the Castle gate with the same horse and wagon, and produced the said ticket to the said Thomas Lovering, and demanded to pass without paying any further toll; and that the said Thomas Lovering demanded 9*d.* toll, which the said George Limpany paid.

The justices, under the circumstances, convicted the said Thomas Lovering in the penalty of 1*s.*, and costs 13*s.* 6*d.*

The above informations were laid under the 4 G. 4, c. 95, s. 30.(*a*)

*The before-mentioned turnpike-roads are comprised in The Tiverton Roads Act, 1861, by the 9th section of which it is [*422 enacted as follows,—"This act shall be put in execution for the purpose of more effectually improving, maintaining, and keeping in repair the several roads (among others) following, that is to say,—the road from Hunt's house, near Lowman Bridge, in the parish of Tiverton, to a place called the White Ball, in the parish of Sampford Arundell,—the road from the way-post in the North-East end of Leonard Moor to the White Hart, in Collumpton,—the road from the Eastern end of Broad Lane, in Tiverton, to Crediton Forches, in the parish of Crediton,—the road from Bickleigh Bridge Cross to a certain house formerly called the Swan Inn in Silverton, and from a place called Jenny's Post at or near a corner of the said road, by way of the Ruffwell Inn into the Exeter turnpike-road near the sixth mile-stone,—the road from the works near the castle in the town of Tiverton, through Bolham and Cove, to Bampton,—the road from Chapman's Bridge, by way of Duvale, into the road near the Exe Bridge turnpike-gate leading towards Dulverton,—the road from the Eastern end of Belle Vue Lane to Mary Pole Head, and from thence to the one-mile post from the city of Exeter, near Mary Pole Head."

By the 11th section it is enacted, that, "on the 1st of January, 1862, and at all times thereafter, it shall be lawful for the said trustees to demand and take, or cause to be demanded and taken, at the several and respective toll-gates which shall be upon or on the sides of the said roads such tolls as the said trustees at *any of their [*423 meetings shall direct, not exceeding the sums following (among others), that is to say,—For every horse or other beast, except an ass, when drawing singly any wagon, cart, or other such carriage, the sum of 6*d.*—For every horse or mule, laden or unladen, and not drawing, the sum of 1½*d.*,—which said tolls shall be taken before any horse or other beast, cattle, carriage, or thing liable thereto, shall be permitted to pass through any toll-gate which shall by virtue of this act be continued or erected upon or on the sides of the said roads."

And by the 13th section it is enacted, that, "for passing and repassing any number of times on the same day, with the same horses, beasts, or carriages liable to toll, through any of the toll-gates to be continued or erected by virtue of this act upon any road hereinafter particularly mentioned, no more than the number of tolls hereinafter limited with reference to such road shall be taken, that is to say,—*two* full tolls, and no more, upon the road from Hunt's house, near Lowman's Bridge, in Tiverton, to the White Ball, in Sampford Arun-

(*a*) Which enacts, amongst other things, that "if any collector of tolls shall demand and take a greater or less toll from any person than he shall be authorized to do by virtue of the powers of any act, or of the orders and resolutions of the trustees or commissioners made in pursuance thereof, or shall demand and take a toll from any person or persons who shall be exempt from the payment thereof, and who shall claim such exemption, &c., or shall refuse or omit to give to the person paying the toll a ticket denoting the payment of the tolls, and naming and specifying the toll-gate at which such ticket has been delivered, and the toll-gate or toll-gates (if any) freed by such payment, &c., then and in every such case every such toll-collector shall forfeit and pay any sum not exceeding 5*l.* for every such offence."

dell; *two* full tolls, and no more, upon the road from the Eastern end of Broad Lane, in Tiverton, to Crediton Forches; *two* full tolls, and no more, upon the road from Tiverton to the one-mile post from the city of Exeter near Mary Pole Head; *one* full toll, and no more, upon *all* the other roads comprised in this act."

The 14th section enacts, that, "except as in this act is otherwise provided, all horses, beasts, and cattle in respect whereof the tolls hereby authorized to be taken shall have been paid at any toll-gate on the said roads or on the sides thereof, shall, upon a ticket being produced denoting such payment, be permitted, in returning through the same toll-gate and in going and returning through such other toll-

*424] gate (if any) as the ticket *for such payment shall free, to pass toll-free at all times on the same day."

Nothing turns on the forms of the tickets given by the several defendants to the several complainants in these cases and the gates they may express to free on their face, as the defendants, by direction of the lessee of the tolls, their master, on and from the 12th of January, 1863, issued tickets to passengers paying tolls expressing to free no other gate or gates than those on the immediate line of road on which the same are issued, and not on their face expressing to clear any other gate on either of the above lines of road on which two full tolls may be taken.

The several defendants William James, Patrick Williams, and Thomas Lovering, respectively, being dissatisfied with the determination of the justices upon the hearing of the said informations, as being erroneous in point of law, duly demanded a case for the opinion of this court; and such cases were at their request consolidated, as above.

The questions of law arising upon the foregoing statements for the opinion of the court were,—

1. Whether it was lawful for the said William James to demand and take from the said John Dickenson the sum of 3*d.*, or more than *one* full toll at the said Ashley gate, that gate being one of the gates erected on one of the lines of road on which no more than *two* full tolls may be taken.

2. Whether the said Patrick Williams was authorized to and could lawfully demand, receive, and take any toll, and, if any, then whether he could lawfully take more than *one* full toll (which by the Tiverton Roads Act, 1861, is stated to be 6*d.*) for a wagon drawn by one horse passing through the said Horsdon gate, being one of the gates erected on a line of road on which no more than *two* full tolls may be taken.

*425] *3. Whether the said Robert Wills, having paid one full toll at the College gate at Collumpton, being a gate upon a line of road upon which *one* full toll only can be taken, was not entitled, on the same day, on the production of a ticket denoting such payment to pass toll-free through any one gate upon a line of road upon which *two* full tolls may be taken.

4. Whether the said George Limpany, having paid one full toll at the Duvale gate, being a gate on one of the lines of road on which *one* full toll only can be taken, was not entitled, on the same day, on the production of a ticket denoting such payment, to pass toll-free through all or any of the toll-gates on all or any of the roads upon

which *one* full toll only may be taken; and whether it was lawful for the said Thomas Lovering at the Castle gate to demand and take from him a second toll as aforesaid.

Turner, for the appellants.—The first two cases are nearly identical. The sections of the local act, 24 Vict. c. xix. upon which the questions will mainly turn, are, the 11th, 13th, and 14th. The first defines the amount, and the second the number of tolls to be taken, and the third entitles a traveller who has once paid the proper toll to pass and re-pass free for the day. 1. On passing the Ashley gate,—which is a gate where by s. 13 *two* full tolls are payable,—Mr. Dickenson was called upon and compelled to pay a double toll. It will be said on the other side, that, to entitle the collector to demand the *two* full tolls, the party must pass through *two* gates. The language of the 13th section, however, is in the singular number, as it also is in s. 14. The three roads are about twelve miles long.

2. In the second case, Wills having already paid 9*d.* for one full toll on passing through the College gate at *Collumpton with a horse and wagon, on coming to Horsdon gate, at which by [*426 s. 13 *two* full tolls are payable, claimed to be entitled to pass through without further payment; but the collector demanded and received 1*s.* 6*d.* for *two* full tolls. This, it is submitted, he was entitled to demand, the Horsdon gate being one at which by s. 13 *two* full tolls are payable. Wills clearly was not entitled to pass the second gate toll-free.

3. In the 3d case, Limpany having paid 9*d.* for one full toll for passing with a horse and wagon through the Duvale gate, at which by s. 13 *one* full toll is payable, and received a ticket denoting such payment, claimed to be entitled to pass through the Castle gate (where *one* full toll also was payable) without further payment. This question turns upon the last sentence of s. 13,—"One full toll, and no more, upon *all* the other roads comprised in this act." [BYLES, J.—The question is whether the word "all" is to be read distributively.] It is submitted that it must be read "each," the word "all" being used merely for the purpose of grouping the several roads other than those particularly defined.

Kingdon, contrà.—1. Mr. Dickenson was improperly charged *two* full tolls for passing a gate at which *one* full toll was payable by virtue of s. 13. The 11th and 13th sections are to be read together: the one defines the amount of toll to be paid at each gate, the other the number of tolls chargeable on any line of road. By s. 11 the trustees are empowered to demand and take, "at the several and respective toll-gates upon the said roads, not exceeding (in this case) 1½*d.* By s. 13 they are empowered to demand that toll twice in the course of the line of certain roads therein defined. This gives them no authority to demand more than *the single toll at one gate. The object [*427 of the legislature evidently was, that, as these were long roads, and necessarily expensive to keep in repair, two gates should be placed so as to catch travellers each way, not to impose a double toll on a man who uses part of the road only. [ERLE, C. J.—We all think the first case a very plain one.]

2. The decision of the first case disposes of one point of the second case; having passed through the gates on a particular line of road, the party coming to a second gate is exempt from the double toll. But

the question remains, whether he is liable for a second single toll. Having passed through one gate and paid one toll, Wills claimed to be entitled to pass through all the other gates on the trust toll-free. That is a proposition that can hardly be sustained: but clearly he was entitled to pass on paying a second *single* toll.

3. The third case raises a different question. It is submitted that the meaning of the last sentence of s. 13 is, that one full toll, and no more, shall be payable in respect of all the other roads, and not one toll at each gate, as is contended for on the other side. It is the usual rule that payment at one gate clears all the other gates on the same trust. The language of s. 13 is express,—"For passing and repassing any number of times on the same day, with the same horses, &c., through *any* of the toll-gates to be continued or erected by virtue of this act, upon any road hereinafter particularly mentioned, no more than the number of tolls hereinafter limited with reference to such road shall be taken, that is to say, two full tolls, and no more, upon the road from A. to B.; two full tolls, and no more, upon the road from C. to D.; two full tolls, and no more, upon the road from E. to
*428] F.; one full toll, and no more, *upon all the other roads *comprised in this act.*" If the words, "each of" had been used instead of "all," the construction contended for on the other side would have been well founded. But there is nothing in the context here to warrant such a contention: and, if it be left doubtful, the court will not put such a construction upon the act as will impose the burthen.

Another question arises as to the charge for a wagon having the fellies of the wheels of less width than 4½ inches. The collector claims, by virtue of the 7th section of the general act, 3 G. 4, c. 126,(*a*) to be entitled to add one half more. The special provision of the 2d clause in the 11th section of the local act, 24 Vict. c. xix.,—which imposes a toll of 6*d.* only "for every horse, &c., drawing any cart wagon, &c., with wheels of a less breadth than 4½ inches,—operates
*429] a repeal of the provision in the general act. Upon that *point, Ridge *v.* Garlick, 8 Taunt. 424, is an express authority. There, a local turnpike act imposed specific tolls on carriages in proportion to the breadth of the wheels, such tolls being increased in proportion to the narrowness of the wheels, and being highest where the wheels are of less breadth than six inches: and it was held that the carriages subject to such tolls were exempted from the additional toll imposed

(*a*) Which enacts that "the trustees or commissioners appointed by virtue or under the authority of any act or acts of parliament made or *to be made* for making or maintaining any turnpike-road, shall and they are hereby required to demand and take, or cause to be demanded and taken, for every wagon, &c., having the fellies of the wheels thereof of less breadth than 4½ inches at the bottom or soles thereof, or for the horse or horses or cattle drawing the same, one-half more than the tolls which are or shall be payable for any carriage of the same description having the wheels thereof of the breadth of 6 inches; and for every wagon, &c., having the fellies of the wheels thereof of the breadth of 4½ inches and less than 6 inches at the bottom or soles thereof, or for the horse or horses or other cattle drawing the same, one-fourth more than the tolls or duties which are or shall be payable on any carriage of the like description having the wheels thereof of the breadth of 6 inches, by any act or acts of parliament now in force *or hereafter to be passed* for making or maintaining any turnpike-road, before any such wagon, &c., respectively, shall be permitted to pass through any turnpike-gate or gates, bar or bars, where tolls shall be payable by virtue of any such acts."

by the latter part of the 23d section of the 13 G. 3, c. 84 (General Turnpike Act), and that the local act virtually repealed that section. Gibbs, C. J., in giving judgment, there says: "This is one of the plainest cases. It was observed when the General Turnpike Act was passed, that a provision was not usually made in local acts for putting a higher toll on narrow-wheeled wagons than on those with broad wheels: the legislature, therefore, made a general prospective provision to supply the defect. This was borne in mind by the legislature on the passing of any subsequent local act which imposed one uniform toll on all carriages of the same description without distinction as to the breadth of their wheels; and it was well known and understood, that, in such an act of parliament, carriages with narrow wheels were in effect subjected to the higher toll imposed by the General Turnpike Act. But, when we find it particularly enacted what toll shall be paid by carriages, having the bottom of the fellies of their wheels nine inches in breadth, what shall be paid by those having the bottom of the fellies six inches in breadth, and what shall be paid by those having the bottom of the fellies of a less breadth than six inches, the legislature has excluded the necessity of any reference to the General Turnpike Act; for, it is impossible to say, that, after the legislature has expressly directed what toll shall be paid in proportion to the narrowness of *the wheels of carriages, the General Turnpike Act shall operate upon the tolls specified, and augment each of them half as much again." [ERLE, C. J.—Where a later act has a special provision imposing a certain toll for narrow wheels, that necessarily controls and supersedes the former general provision.] [*430

Turner, in reply.—Ridge *v.* Garlick, turned upon the 13 G. 3, c. 84. The General Turnpike Act must prevail against all local acts, unless in terms repealed. Its provisions are by s. 4 expressly declared to extend to all local acts then in force, and to all which should thereafter be passed. [ERLE, C. J.—This act does expressly vary or alter the former provision.] The language of the 13th section plainly imports that one full toll shall be taken upon each and every road comprised in the act, other than those therein particularly mentioned. [ERLE, C. J.—We are all agreed as to that.] "Passing and re-passing" means no more than journeying along the road; as in s. 16, which provides that stage-coaches shall pay toll for "every time of passing and re-passing along the said roads." When two or more acts are in pari materiâ, they are to be construed together.

ERLE, C. J.—In this case there were several convictions raising several questions upon the construction of the Tiverton Turnpike Act, 24 Vict. c. xix. The first question is, whether it was lawful for the collector to demand more than one full toll at Ashley gate, being one of the gates on one of the lines of road on which no more than two full tolls were demandable. The words of the act (s. 13) applicable to the first question are,—"For passing and re-passing any number of times on the same day, with the same horses, beasts, or carriages liable to toll, through any of the *toll-gates to be continued or erected by virtue of this act, upon any road hereinafter particularly mentioned, no more than the number of tolls hereinafter limited with reference to such road shall be taken, that is to say, two [*431

full tolls, and no more, upon the road from the Eastern end of Broad Lane, in Tiverton, to Crediton Forches." On behalf of the collector it has been contended that a traveller passing through any one of the gates on that line of road was liable to two full tolls. The 13th section is framed with some ambiguity: but I think it must be read with the 11th section; and, so reading it, Mr. Kingdon's argument has satisfied me that one full toll only is payable at one gate. The 11th section provides that "it shall be lawful for the trustees to demand and take at the several and respective toll-gates which shall be upon or on the sides of the said roads such tolls as the said trustees at any of their meetings shall direct, not exceeding the sums following, that is to say, for every horse," &c., &c. I think that amounts to a prohibition against their taking more than one toll at any one gate. Whatever be the meaning of s. 13, it is enough for us upon the present occasion to say that it does not authorize the imposition of two tolls for passing one gate. The conviction, therefore, as to that, is right.

The second question is whether the collector could lawfully demand any toll, and, if any, whether he could lawfully take more than *one* full toll (6*d.* by the local act), for a wagon drawn by one horse passing through the Horsdon gate, being a gate on a line of road on which no more than two full tolls may be taken. Wills, having paid one full toll on passing through the College gate, claimed to be entitled to pass free through the Horsdon gate. The collector demanded and received two full tolls. I think he was wrong in one sense, and right in another. He was *entitled to demand one full toll; *432] but he was wrong in demanding two. In that case also the conviction is right.

The third question is, whether Wills, having paid one full toll at College gate, a gate upon a line of road upon which one full toll only can be taken, was entitled, on the same day, on the production of a ticket denoting such payment, to pass toll-free through any one gate upon a line of road upon which two full tolls may be taken. That rests upon the language of s. 13, which provides that there shall be taken "one full toll and no more, upon *all* the other roads comprised in this act." It is contended on the part of the respondent, that, having paid one toll on passing through one of the gates, he was entitled to pass through any other gate upon the trust without payment of any further toll. The 9th section enumerates eighteen roads included in the one trust; and by s. 11 the trustees are empowered to demand two full tolls upon three of these lines of road, and one full toll and no more upon *all* the others,—that is, as I read the act, upon *each* of the other roads: the evident meaning of the statute being that two full tolls shall be taken for each of the long lines of road, and one full toll for each of the others. The 14th section enacts, that, "except as in this act is otherwise provided, all horses, beasts, and cattle in respect whereof the tolls hereby authorized to be taken shall have been paid at any toll-gate on the said roads, or on the sides thereof, shall, upon a ticket being produced denoting such payment, be permitted, in returning through the same toll-gate, and in going and returning through such other toll-gate (if any) *as the ticket for such payment shall free*, to pass toll-free at all times on the same day." It is the clear duty of the trustees to put, and it is highly expedient

that they should put, on the back of their tickets the names [*433
*of the several gates which the recipient of the ticket is entitled to pass through free of toll. But the statute gives us no jurisdiction either over them or the collector in this respect. I think the conviction in this case was wrong, and that the collector was entitled to demand from Wills another single toll for passing through another gate.

The fourth question is whether Limpany, having paid one full toll at the Duvale gate, a gate on one of the lines of road on which one full toll only can be taken, was entitled, on the same day, on the production of a ticket denoting such payment, to pass toll-free through all or any of the toll-gates on all or any of the roads upon which one full toll only may be taken, or whether the collector was entitled to demand a second toll at the Castle gate. My answer to that question is, that, if the last-mentioned gate is marked upon the ticket, he is entitled to the exemption; otherwise not.

The last question is this. The trustees claim to increase the wagon tolls one half under the 7th section of the General Turnpike Act, 3 G. 4, c. 126, the fellies of the wheels being less than 4½ inches in breadth. I am of opinion that that provision does not apply. The local act, in s. 11 contains an express provision as to the breadth of wheels, which virtually repeals the former provision, and therefore I think the increased charge is not justifiable. The case of Ridge *v.* Garlick, 8 Taunt. 424, is expressly in point. I take the universal rule of construction of acts of parliament to be, that, where a general enactment is followed by a specific enactment on the same subject, the later enactment overrides and controls the earlier one.

WILLES, J.—I am entirely of the same opinion.

*BYLES, J.—I am of the same opinion. It is plain that the [*434
word "all" is not used in the 13th section in the sense of the aggregate, but means each of the other roads. The marginal note "Limiting the number of tolls," fortifies this construction.

KEATING, J.—I am of the same opinion.

ERLE, C. J.—There will be no costs, the respondents in part succeeding and in part failing. Judgment accordingly.

END OF EASTER TERM.

MEMORANDUM.

George Stovin Venables, Esq., of the Inner Temple, having been appointed one of Her Majesty's Counsel learned in the Law, took his seat within the Bar on the first day of Easter Term.

IN THE EXCHEQUER CHAMBER.

EASTER VACATION, 1863.

STEPHANOS XENOS and Another *v.* WICKHAM, Chairman of THE VICTORIA FIRE AND MARINE INSURANCE COMPANY. *May* 12.

One L., an insurance-broker, as agent for the plaintiffs, gave instructions for a policy of 2000*l.* on the ship Leonidas belonging to the plaintiffs, to be prepared by the defendants, an incorporated insurance company. Before the policy was ready, the plaintiffs changed their minds, and directed L. to effect a policy for 1000*l.* instead of 2000*l.*, and upon somewhat different terms. L. accordingly delivered a second slip to the company, pursuant to the last instructions, and was debited by them with the premium in the usual way, the amount of which he afterwards received from the plaintiffs. A policy for 1000*l.* was thereupon, pursuant to the practice of insurance companies, filled up by the company and duly executed and sealed by two directors, and retained by the company until called for by the assured or their broker. On the premium becoming due from L. to the company, a debit-note was handed to one of L.'s clerks, with a demand of payment; whereupon the clerk said that it was a mistake, and that the insurance on the Leonidas had been cancelled. A second messenger was sent from the company's office, with the policy executed, to show that such an insurance had been effected; but L.'s clerk persisting that it had been done in mistake, the messenger took back the policy; and on the same day L.'s clerk called at the office of the company, and requested that the policy might be cancelled, and thereupon the following memorandum was endorsed upon it and signed by the two directors,—"Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto." The Leonidas being afterwards lost, the plaintiffs repudiated the cancellation of the policy, which it was admitted was done without their knowledge and consent, and brought an action on the policy:—

Held, in the Exchequer Chamber, by Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.,—affirming the judgment of the court below,—that there had never been any delivery of the policy by the company so as to constitute a complete contract between them and the plaintiffs, —Blackburn, J., and Mellor, J., dissenting.

THIS was an appeal by the plaintiffs under the provisions of the Common Law Procedure Act, 1854, against the decision of the Court of Common Pleas, in discharging a rule of that court obtained by the plaintiffs, pursuant to leave reserved, to show cause why the verdict found for the defendant should not be set aside, and instead thereof a verdict entered for the plaintiffs for the amount sought to be recovered in this action, or why a new trial should not be had on the ground of misdirection.

The first count of the declaration was upon a valued time policy of insurance for 1000*l.*, alleged to have been effected with the company represented by the defendant, by the plaintiffs, under the name
*436] and style of The Greek and Oriental Steam Navigation *Company, upon the hull, stores, and machinery of a vessel called the Leonidas, and averred a total loss by the perils insured against. The declaration also contained counts for money paid, money received for the use of the plaintiffs, and upon accounts stated, and also a count in trover alleging the conversion of policies of insurance.

To the first count the defendant pleaded,—first, a denial that his company became insurers as alleged,—secondly, a denial of the

alleged interest,—thirdly, a denial of the loss,—fourthly, that, before the loss, the policy was at the request of the plaintiffs cancelled, and the risk determined: to the money counts the defendant pleaded, never indebted, and payment before action; and to the count in trover, not guilty, and not possessed.

The cause was tried before Erle, C. J., and a special jury, at the sittings in London after Hilary Term, 1862, when the following facts were proved:—

1. The plaintiffs carry on business as merchants and shipowners in the city of London, under the name and style of The Greek and Oriental Steam-Navigation Company, and, at the time of the several orders to insure hereinafter referred to, were owners of the steamship Leonidas, and continued to be such owners up to and at the time of the loss of that ship as hereinafter stated.

2. The defendant is the chairman of The Victoria Fire and Marine Insurance Company, and was sued as the nominal defendant on behalf of the said company.

3. On the 25th of April, 1861, the plaintiffs employed one Lascaridi, an insurance-broker in the city of London, to effect insurances upon the said vessel for six months, to the amount of 5000*l.*; and on that occasion gave the following order to Lascaridi:—

"5000*l.* on steamer Leonidas between England and *the Baltic until the close of the season, from to-day, at 8*l.* 8*s.* There is another policy 11,000*l.* Hull, 12,000*l.*; engines, 4000*l.* [*437

"Newcastle, Hartlepool policy.

"Years 9 A 1. One hundred horse power.

"S. XENOS, 25th April, 1861."

4. Lascaridi thereupon, in accordance with the usual practice, prepared a slip embodying the terms of the said insurance; and, upon his application, the said slip was signed with their initials or names by various underwriters at Lloyd's, for different sums amounting in all to 3000*l.*, and by one E. J. Sprange, a clerk of the defendant's company, on behalf of such company, with the initials E. J. S., for the sum of 2000*l.*, the proportion of the said total amount of 5000*l.* for which the company were willing to grant a policy. The slip was as follows:—

"G. P. Lascaridi C/A on steamer Leonidas.

"From 25th April to 15th October,

at 7½ gs. Valued at 16,000*l.*"

[Then followed the several amounts underwritten and the initials or names of the underwriters.]

"Greek and Oriental Company."

5. A separate slip was at the same time prepared by Lascaridi and signed by Sprange with his initials for the sum of 2000*l.* which was to be insured by the defendant's company, and was left by Lascaridi at the office of the defendant's company, in order that a policy in accordance with the said slip might be made out by the defendant's company.

6. In the case of private underwriters at Lloyd's, it is the custom, in effecting insurances, to have but one slip, which is signed by the different underwriters for the amounts for which they are willing to

*438] become insurers; and a policy is subsequently prepared by the *broker of the assured, and taken by him (the broker) to the different underwriters in succession, for execution.

7. In the case of insurance companies, a separate slip is always prepared for each company by the broker of the assured; and the policy is afterwards prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker.

8. After the said slip for 2000*l.* was left as aforesaid at the office of the defendant's company, and before any policy had been made out upon it, the plaintiffs, finding that for an additional premium of 2*l.* 2*s.* per cent. an insurance could be effected upon the said vessel for twelve months, and for all seas, sent to Lascaridi the following direction in writing:

"29th April, 1861. Please cancel Leonidas insurance, and insure the same for all the year, and for all seas, 4000*l.*, valued 13,000*l.*, with other policies, @ 10*l.* 10*s.* "S. X. & Co.

9. Lascaridi, after receipt of this order, called, on the 30th of April, at the office of the defendant's company, and told them that he wished the insurance to be off, as he was going to re-insure the steamer for twelve months, and for all seas; and thereupon the said slip was destroyed, and another slip was prepared by Lascaridi, and which was signed by different underwriters at Lloyd's for a portion of the amount therein mentioned, and by Sprange with his initials on behalf of the company for the sum of 1000*l.* [The slip was set out.]

10. A separate slip was also prepared for the defendant's company by Lascaridi for the sum of 1000*l.*, and left by him at the office of the defendant's company. The following is a copy of the last-mentioned slip:—

No.	In whose name and on what.	Sum.	Victoria Marine Insurance Co. Voyage. Free in respect to average as printed in the policy, unless otherwise specially agreed; including risk of craft to and from the ship: warranted free from capture and seizure and the consequence of any attempt thereof.	Ship's name and classification.	Master's name.	Premium per cent.
	Greek and Oriental Company.	1000*l.*	For twelve months from 25th April, 1861, on hull, stores, and machinery valued at 13,000*l.* F. & S. C / A April 30th, 1861. Account of G. P. Lascaridi. Address, 27, Bishopsgate Street.	Leonidas steamer.		10 Guineas.

11. The letters C. A. in the said Lloyd's slip stand for the words

"Cash Account;" and the custom, as between insurance companies and insurance brokers is, for the companies to give credit to the brokers for the premiums, and to debit them in account with the amount of the premium; and, when insurances are effected for cash, or on cash account, a month's credit is given, that is to say, all premiums for insurances effected during each month are payable on the 8th of the succeeding month; and it is the practice to make out prior to the expiration of the credit, and send to the broker at the end of the month, a debit-note for the amount of the premiums due, less a discount and brokerage of 15*l.* per cent.

12. Lascaridi was accordingly upon the signature of *the last-mentioned slip debited in the books of the defendant's company, under the date of the 1st of May, 1861, with 105*l.*, the amount of the premium, and 2*l.*, the amount of the stamp-duty. The said entry appears on the debit side of the account,—of which a copy was set out in the case. [*440

13. On the 1st of May, Lascaridi sent in to the plaintiffs an account debiting them with the sum of 388*l.*, being the amount of the premium and stamp-duty payable on the said insurance, in the following form:—

"Dr. Greek and Oriental Company to G. P. Lascaridi.		Cr.
"6000*l.* on maize per Lord Byron St. at 20*s.* per cent.	£60 0 0	
Policy	1 10 0	
	61 10 0	
"Less 10 per cent. on 57*l.* . .	5 14 0	
	55 16 0	
"4000*l.* per Leonidas St.	388 0 0	
	£443 16 0"	

and at the same time drew upon the plaintiffs a bill of that date, at four months, for 443*l.* 16*s.*, being the amount of the said account and of the account of another insurance effected by him for them; and that bill was accepted by the plaintiffs, and paid at maturity. Lascaridi told the plaintiffs when they accepted the bill that the policy would be ready in a day or two.

14. In the course of a few days afterwards, a policy in the form usually adopted by the defendant's company was filled up from the said last-mentioned slip, and dated the 1st of May, 1861. [A fac-simile of this policy accompanied and formed part of the case.(*a*)]

*15. About the 8th of June, 1861, a debit-note for the premium and stamp upon the said policy, less the discount, was sent by a messenger from the office of the defendant's company to the office of Lascaridi, with a request for payment. The debit-note was in the following form:— [*441

(*a*) This document was in the usual form, except as to the conclusion, which was as follows:—"In witness whereof, and that the said company are content with this assurance for the sum of 1000*l.* we the undersigned directors of the said company for the London branch (on behalf of the said company, in pursuance of the powers and directions contained in the deed of settlement of the company,) have hereunto set our hands and seals at London this 1st day of May, 1861." Then followed the signatures and seals of two directors, and an attestation-clause in the usual form, signed "R. M. Scaife," who was described as "Res. Sec."

"Victoria Marine Insurance Company.

"Mr. G. P. Lascaridi, 27, Bishopsgate Street.			
"To premiums for May, 1861	£100	0	0
"By 10 per cent. discount	10	0	0
	90	0	0
"To duty	2	0	0
"Due June 8th	£92	0	0

"Memorandum. The discount will be forfeited, in default of prompt payment."

16. On presenting the said debit-note to one of Lascaridi's clerks at the office of Lascaridi, the messenger was told by the said clerk that no premium was due: and, upon a second messenger being sent again to the office of Lascaridi with the said policy and the said debit-note, with the name of the Leonidas, the amount of the proposed insurance, and rate of premium endorsed upon it, he was told by the clerk that the policy ought not to have gone forward.

17. In the course of the same day, one of the clerks of Lascaridi called at the office of the defendant's company and said that the policy had been put forward in error, and requested that it should be cancelled.

*442] *18. A memorandum of cancellation was thereupon endorsed on the said policy in the form which appears endorsed on the copy of the policy which accompanied the case,(a) and was signed by John Du Croz and Robert Sutherland, two of the directors of the defendant's company, and by Mr. Reginald Scaife, the secretary thereof: and it was arranged with the clerk of Lascaridi, that Mr. Lascaridi should be debited with the expense of the stamp on the policy; and the policy was on that occasion handed to the said clerk of Lascaridi, with the said memorandum of cancellation endorsed thereon, in order that he might, if possible, obtain from the commissioners of inland revenue, for the benefit of Lascaridi, a return of the stamp-duty.

19. No inquiry whatever having reference to the said policy had been made at the office of the defendant's company between the time when the said slip for 1000*l.* had been left there as aforesaid and the time when the said debit-note had been sent to Lascaridi's office as aforesaid.

20. After the said policy had been parted with by the company as aforesaid, a sum equal to the amount of the said premium, less

(a) The memorandum was as follows:—

"Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto.

"£1000 at 10 gs. per cent.	£105
"Less 5 per cent.	5
	£100
"10 per cent.	10
	£90

"London, June 14th, 1861.

"John Du Croz, } Directors.
"R. Sutherland, }
"R. M. Scaife, Res. Sec."

brokerage and discount, was entered in their books to the credit of Lascaridi; and he continued to be debited only with the amount of the said stamp-duty. The said entries are those which appeared in the account referred to in paragraph 12.

21. On the morning of Monday, the 2d of *September, 1861, [*443 Lascaridi's insurance clerk, Mr. Fenn, called at the office of the defendant's company, and, producing the policy, stated that it had been cancelled by mistake, and wished it reinstated. He was informed, that, if the ship was safe, and not in the Baltic, there would be no objection to take the risk; and he was requested to call again for an answer.

22. At 8.20 in the morning of the said 2d of September, 1861, intelligence had been received at Lloyd's, by telegram purporting to have been despatched from Wyborg at 7.40 that morning, of the loss of the said vessel, stranded on the Nevro: but the fact of the said loss did not become known at the office of the defendant's company, or to any of the officers of the company, until 3 o'clock in the afternoon of that day.

23. On hearing of the loss, the defendant's company declined to take the said risk, or renew the said policy; and thereupon the present action was commenced.

24. It was admitted, on behalf of the defendant, that the plaintiffs never at any time in fact authorized the cancellation of the said policy, or were aware of it; nor did they ever receive from Lascaridi any part of the premium, nor any credit for the same.

25. The following correspondence took place between the plaintiffs and the defendant's company,—

September 3d, 1861, plaintiffs to the manager of the company:—

"Sir,—You hold in your possession a policy for 1000*l.* effected for twelve months on the body, &c., of the S. S. Leonidas. The premium on this amount was paid to Mr. G. P. Lascaridi a long time ago, at the same time that he was settled with for the other 3000*l.* insured. We shall therefore feel particularly obliged by your forwarding the said policy direct to us."

September 4th, 1861, the secretary of the defendant's company to the plaintiffs,—

*"Gentlemen,—I beg to acknowledge your favour of the 3d [*444 instant. In reply, I am much surprised at its contents, inasmuch as you will find, upon reference to your broker Lascaridi, that there is no policy in existence with this company on the steamer Leonidas, except the one effected by Mr. M. E. Mavrocordato."

September 5th, 1861, plaintiffs to the secretary of the defendant's company,—

"Sir,—In answer to your letter of yesterday, I beg to say that you must not be surprised at my asking you for the policy for 1000*l.* per Leonidas, effected by Mr. G. P. Lascaridi, the premium on which I paid on the 1st of May last, and which you now hold. How can you say there is no such policy in existence with your company? On referring to Mr. G. P. Lascaridi for the policy, as you desired me, I learn from him that you have it. Therefore I must again demand it of you, otherwise I shall at once take the necessary steps to make you deliver it up."

To this the company's secretary replied on the 6th of September, acknowledging its receipt, and confirming their letter of the 4th.

26. Upon proof of the foregoing facts, the Lord Chief Justice directed the jury to find for the defendant, reserving to the plaintiffs leave to move to enter the verdict for them if the court should be of opinion that the policy was binding upon the defendant's company, and had been cancelled without authority.

27. In pursuance of the leave so reserved, the plaintiffs, in Easter Term, 1862, obtained a rule nisi to enter the verdict for them for the amount sought to be recovered, "on the ground that the judge ought to have told the jury that there was no cancellation of the policy binding on the parties; that, under the circumstances proved, Lascaridi's clerk had no authority to assent to a return of the premium and cancellation *of the policy; and that the acts of Lascaridi *445] and his clerk were not binding on the plaintiffs,"—or for a new trial, on the ground of misdirection, in telling the jury, that, if they believed the statements of the defendant's witnesses, they should find their verdict for the defendant.

28. The rule came on to be argued in Trinity Term last; and at the sittings in banco after that term the court gave judgment discharging the rule, on the ground that the policy in question never was perfectly delivered so as to vest a right of action in the plaintiffs, and that the original executory contract for the last insurance had been rescinded before breach.

The appeal came on to be argued at the sittings in error after Easter Term, 1863, before Pollock, C. B., Martin, B., Bramwell, B., Channell, B., Blackburn, J., and Mellor, J., when *Lush*, Q. C. (with whom was *Sir G. Honyman*), was heard for the plaintiffs, and *Bovill*, Q. C. (with whom was *Hawkins*, Q. C.), for the defendant.

The argument on the part of the plaintiffs was, that the broker had no authority to authorize the cancellation of the policy; that, assuming the broker to have such authority, it did not appear that he assented to the cancellation, and that his clerk had no authority to do so; that there was no evidence to go to the jury in support of the allegation that the policy was cancelled at the request of the plaintiffs; that, upon the facts, it appeared that the policy had actually been executed as a binding instrument; that, as between the plaintiffs and the defendant's company, the premium was paid and the insurance completed; that the plaintiffs were entitled, as against the defendant, to the policy, and to recover the same in trover; that, to constitute a delivery of a deed, it is not necessary that it should have actually passed out of the possession of *the party making it, but that *446] it is enough if it is signed and sealed with the intent that it shall operate as a perfect deed,—Doe d. Garnons *v.* Knight, 5 B. & C. 671 (E. C. L. R. vol. 11), 8 D. & R. 349; and that assent will be presumed, until the contrary is proved,—Butler and Baker's Case, 3 Co. Rep. 25; Taw *v.* Bury, Dyer 167 a, Bendl. 75; Alford *v.* Lee, 2 Leon. 110.

For the defendant it was contended that the policy in question never was perfectly delivered by the company or accepted by the plaintiffs so as to vest a right of action in the latter; and that, if the policy ever was binding upon the company, it was afterwards duly cancelled,

and the contract thereby rescinded. Townson *v.* Tickell, 3 B. & Ald. 31, was cited.

The Court being divided in opinion, their judgments were, after time taken for deliberation, delivered seriatim, as follows:—

MELLOR, J.—In this case the plaintiffs, who traded under the name of The Greek and Oriental Steam-Navigation Company, employed a broker named Lascaridi, on the 25th of April, 1861, to effect an insurance on the ship Leonidas, from England to the Baltic. Lascaridi applied to the defendants, who are an insurance company, and they agreed to become insurers to the extent of 2000*l.* for the season, at 8 guineas per cent., and a slip was accordingly prepared by Lascaridi, and initialed by the defendants' clerk. Before any policy was actually prepared, the plaintiffs became desirous to be off that insurance, and in lieu of it to obtain an insurance for all seas for a year from 30th of April, at 10 guineas; and accordingly, on the 29th of April, 1861, they wrote to Lascaridi, as follows:—"Please cancel Leonidas insurance, and insure the *same for all the year, and for all seas, [*447
4000*l.*, valued 13,000*l.*, with other policies, at 10*l.* 10*s.*" Lascaridi thereupon applied to the defendants, who agreed at his request to be off that insurance, and the slip for 2000*l.* was destroyed accordingly, and another slip prepared by Lascaridi in conformity with his instructions from the plaintiffs, and initialed by the defendants' clerk for 1000*l.* A separate slip was made out by Lascaridi for 1000*l.*, and left with the defendant's company at their office, in order that a policy might in the usual course be made out by them from it. In the case of insurance companies, the slip is always prepared by the broker, and the policy is afterwards prepared and filled up from the slip by the officers of the company; and the policy, when executed, *is kept by the company, "until sent for by the assured or his broker."* The custom between insurance companies and insurance brokers, is, for the company to give credit to the broker for the premium; and, when an insurance is effected for cash, or on a cash account, a month's credit is given, that is, all premiums for insurances effected during each month are payable on the 8th of the succeeding month; and the course is, to make out prior to the expiration of the credit, and send to the broker at the end of the month, a debit-note for the amount of the premiums due, less a discount and brokerage of 15 per cent. Lascaridi was accordingly debited in the books of the defendant's company on the 1st of May with 105*l.* and 2*l.* for stamp. On the 1st of May, the plaintiffs paid to Lascaridi the premium and stamp-duty on the entire insurance. In the course of a few days afterwards, a policy dated the 1st of May, 1861, in the form usually adopted by the defendant's company was filled up from the said last-mentioned slip, and was signed, sealed, and delivered by two directors of the defendant's company, but was, according *to the usual course of business, retained by the com- [*448
pany in their own custody until sent for by the assured or his broker. On the 8th of June, a debit-note for the premium and stamp-duty upon the policy, less the discount, was sent to Lascaridi's office, with a request for payment. On presenting the debit-note to one of Lascaridi's clerks, the messenger was informed that no premium was due; and, upon a second request, accompanied by a statement of the name of the vessel and the rate of premium, being sent to Lascaridi's

office, the messenger of the defendant was told by the clerk that it ought not to have gone forward: and subsequently a clerk of Lascaridi's called at the defendants' office and said that the policy had gone forward under mistake, and requested it might be cancelled. A memorandum of cancellation was thereupon endorsed upon the policy, and signed by two directors and the secretary of the defendant's company; and it was agreed that Lascaridi should be debited with the expense of the stamp; and the policy so endorsed was handed to Lascaridi's clerk, in order that Lascaridi might obtain a remission of the stamp-duty. The ship was afterwards lost; and the plaintiffs, who were entirely ignorant of the arrangement for cancellation of the policy made by Lascaridi, and who never authorized it, or received back any part of the premium which they had paid for the insurance of the Leonidas, brought their action against the defendants on the policy for the amount insured with them.

On the trial of the cause a verdict was found for the defendant, the question being reserved whether the policy, which purported to be under the seals of two directors of the company, had ever been executed, or, if executed, had been cancelled.

The Court of Common Pleas were of opinion with the defendant,
*449] holding that the policy in question *"never was perfectly delivered so as to vest a right of action in the plaintiffs, and that the original executory contract for the last insurance had been rescinded before breach."

I have come to the conclusion that that judgment is erroneous.

It nowhere appears from the case that Lascaridi had any special authority, but had merely the ordinary authority of a broker to effect an insurance on the ship: and, when that insurance was effected, his authority ceased. During the negotiation, and so long as the terms were unsettled, or the policy not executed, as between himself and the defendants, he might have assented to any alteration of terms, or have abandoned the negotiation: but, when he had arranged the terms, and made out the slip in conformity with his instructions from the plaintiffs, and the defendants had in the usual course filled in the policy, and the directors had signed and sealed it in due form, *and merely retained it in their own possession "until sent for by the assured or his broker,"* it appears to me that a right of action did thereupon vest in the plaintiffs, who alone from thenceforth could cancel or rescind the policy. The premium, &c., had been paid as between the plaintiffs and the defendants by their course of dealing with the broker. The broker had prepared the slip in perfect conformity with his instructions; the policy in the usual course had been filled in by the defendants in conformity with the slip delivered by the broker, and was signed, sealed, and delivered, and attested, in the usual manner, and was then simply kept in their custody "until called for by the assured or their broker." If the assured or their broker had called or sent for the policy between the time of making it and the time of presenting the debit-note to the broker's clerk and his refusal to pay the
*450] premium, it would have been handed *over to them as a matter of course. The defendants had done all they had intended to do to complete the policy: and I cannot understand what necessity there could be under the circumstances for any acceptance of the deed

by the plaintiffs or their broker. Neither the plaintiffs nor their broker had any right to object to the form or terms of the policy; and the taking manual possession of the instrument by the plaintiffs or Lascaridi was in no respect essential to its binding effect.

In the judgment of the Court of Common Pleas it appears to have been assumed that there existed in the present case circumstances amounting to a repudiation and disclaimer of the policy on the part of the plaintiffs or their authorized agent at the time of the delivery, which being acquiesced in by the defendants prevented its becoming a complete instrument.

I can find nothing in the statement which warrants that assumption. I think, therefore, that the present case comes within the rule as stated by Bayley, J., in delivering the judgment of the Court of King's Bench in Doe d. Garnons *v.* Knight, 5 B. & C. 671 (E. C. L. R. vol. 11), 8 D. & R. 348,—"Upon these authorities, it seems to me, that, where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party, nothing to show he did not intend it to operate immediately, that it is a valid and effectual deed, and that the delivery to the party who is to take by it, or to any person for his use, is not essential." And, again, quoting a dictum of Lord Ellenborough's, "The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit."

I am therefore of opinion, that, so soon as the policy was filled in and signed, sealed, and delivered by the two directors whose names and seals appear to the *policy, everything was done on the part of the company *which was intended to be done to complete the execution;* and, from that moment, although the policy was retained by the company until sent for by the assured or their broker, it was a binding and complete instrument. That being so, I am clearly of opinion that the broker had no authority to bind the plaintiffs by obtaining or agreeing to the cancellation thereof by the defendants. [*451

In the judgment of the Court of Common Pleas it is stated that "the company had a right to suppose Lascaridi to be invested with full powers from the beginning to the end of the transaction, both with respect to the preliminary contract and the policy to be founded thereon." I do not quite apprehend whether it is intended to be thereby conveyed that Lascaridi had larger powers than are usually incident to the authority of a broker in the negotiation of an insurance. If that be intended, I am bound to express my dissent; as I can see nothing in the case to support that view. I am therefore of opinion that the judgment of the Court of Common Pleas ought to be reversed.

BLACKBURN, J.—In this case the question reserved at the trial, and argued in the Court of Common Pleas and in this court, has been, whether the policy in question was ever so executed as to be binding on the defendant's company; or, if it had been executed, whether before action it had been cancelled, so as to be no longer binding on them.

The Court of Common Pleas have given judgment in favour of the defendant, discharging the rule to enter the verdict for the plaintiffs. After an attentive consideration of that judgment, I am unable to concur in it.

*452] *I think that the result in this case depends more on the view taken of the facts than on any question of law. I shall therefore begin by recapitulating what I conceive to be the facts as appearing on the case. It appears that it was proved at the trial that Mr. Lascaridi was employed as an insurance-broker for the plaintiffs' company. There is no statement that he had any peculiar authority from the plaintiffs: and we must take it that his authority was neither more nor less than the usual authority given to one employed as a broker in the manner stated. The plaintiffs' company had authorized Mr. Lascaridi to obtain for them insurances to the extent of 5000*l.* on the steamer Leonidas between England and the Baltic, from the 25th of April to the end of the season, at 8 guineas per cent. Mr. Lascaridi in the usual way prepared a slip containing these terms, and it was initialed by different private underwriters for sums in the whole amounting to 3000*l.*, and by an authorized clerk of the defendant's company for 2000*l.* This, as is well known, amounts to an agreement between the broker and the different underwriters who have initialed, that they shall bear the risk to the extent to which they have initialed the slip, and shall receive the premiums accordingly: and this agreement is perfectly binding in mercantile honour, and but for the operation of the stamp-laws would also be enforceable at law. Before, however, any policy was executed or any premium paid, the plaintiffs became desirous of cancelling this insurance, and in lieu of it of insuring on the steamer for 4000*l.* for all seas for a year from the 30th of April, at 10 guineas; and they instructed Mr. Lascaridi as their broker to do so. He applied to the defendant's company, who consented to the cancellation of the former slip, and initialed a new slip, by which they agreed to insure 1000*l.* on the steamer on this
*453] *altered risk. Some at least of the other underwriters consented to a similar cancellation. It would rather seem from the documents set out in paragraph 9 of the case, that they did not all do so; but this is not material: we have only to deal with the insurance for 1000*l.* on the Leonidas for a year from the 1st of May, at 10 guineas per cent., to which the plaintiffs through their broker and the defendant agreed finally and bindingly in honour, and, but for the stamp-laws, at law, by initialing the slip (set out in paragraph 9 of the case) on the 30th of April.

The course of business is that stated in paragraphs 6 and 7 of the case. The broker, after the slip is initialed and the assurance agreed on, prepares a policy, which he sends round to the different private underwriters, who sign it. But, with regard to insurance companies (with each of whom there is always a separate policy executed according to the mode which is binding on that particular company), the course is different. It is thus stated in paragraph 7,—"In the case of insurance companies, a separate slip is always prepared for each company by the broker of the assured, and the policy is afterwards prepared and filled up *by the officers of the company, and is kept by the company until sent for by the assured or his broker.*"

Such being the general practice, in this particular case Mr. Lascaridi prepared a separate slip, which he left at the office of the defendant's company, as is stated in paragraph 10, "in order that a policy might in the usual course be made out from it by the defend-

ant's company." That slip, as it is called, is set out in the case. It apparently is on a printed form supplied by the company to the broker, and filled up so that it contains all the necessary particulars for the filling up of a printed policy of the company, so as to carry out the agreement already come to. It is not initialed or *signed on behalf of the company, and is not, like the first [*454 slip, a memorandum of the terms on which the parties had agreed to insure, but a request-note or mandate from the broker to the company to make out and execute a policy according to the practice. It is dated the 30th of April. On that slip are the letters C/A, signifying "Cash Account," an explanation of which is given in the case, and on which I shall have to make some comments: but in the mean time I proceed with the narrative of the events in the order in which they happened.

On the receipt of this slip, the defendant's company, on the 1st of May, debited Mr. Lascaridi in account with the amount of the premium, 105*l.*, and with the cost of the stamp of the policy, 2*l.* It is stated in the case, at paragraph 14, that, "in the course of a few days afterwards, a policy in the form usually adopted by the defendant's company was filled up from the last-mentioned slip, and dated the 1st of May. A fac-simile of that policy accompanies the case, and is to be taken as part of it." On looking at the policy, I find that it concludes in the following form,—"In witness whereof and that the said company are content with this assurance for the sum of 1000*l.*, we the undersigned directors of the said company for the London branch (on behalf of the said company, in pursuance of the powers and directions contained in the deed of settlement of the said company), have hereunto set our hands and seals at London this 1st day of May, 1861:" and, on the face of it, it seems that it purports to be signed and sealed by two gentlemen, John Du Croz and R. Sutherland; and it purports to be "signed, sealed, and delivered in the presence of R. M. Scaife, Res. Sec.;" though the position of the name of this gentleman is such that it is a little ambiguous whether he attests as a witness to the execution by the directors, or countersigns as secretary.

*The policy in this form continued to lie in the office of the [*455 defendant's company. I think we must presume that this was in accordance with what is stated in the case to be the practice, viz., that it was "kept by the company till sent for by the assured or his broker." In the mean time, on the 1st of May, the plaintiffs paid Mr. Lascaridi the amount of the premiums. Nothing whatever more was done until the 8th of June.

I have been thus particular in stating these facts and dates, because it seems to me that the first question to be determined, is, whether during the interval between the affixing of the seals and names of the two directors to the policy and the 8th of June the plaintiffs really were insured. All parties evidently considered them as being so. The period during which the ship was to be covered was running on, the premiums were paid, and the plaintiffs thought their risk covered: yet, according to the argument for the defendant, this was all a mistake. The company, if a loss occurs at any time whilst the policy is lying in their office with their seal affixed, and ready to be given to the assured, but kept by them according to the practice till sent for

by the assured or his broker, may (it is said), if dishonest enough resist any attempt at law to make them pay, as the policy was not binding. As brokers, from their well-founded confidence in the insurance companies, probably often leave the policies for a considerable time at their offices, sometimes even till the risk is run off, it is a question of some importance whether the companies can under such circumstances resist a claim. I am perfectly well aware that no respectable company would try to do so, or that, if they attempted it, they never would do business again in London; and therefore it may be said to be of less importance. But I cannot think it satisfactory when the rule of law is such as to baffle the intention of the parties, *456] and the *real bargain is only fulfilled when parties are too honest to take advantage of the iniquitous benefit given them by law. Such cases do arise under the statute law not uncommonly; but they rarely arise under the common law, and very rarely under the commercial law. This case may, however, be an exception; and I proceed to examine whether the law is such that the defendant's company, if so minded, could successfully have resisted a claim made, say, on the 1st of June, for a loss happening some time in May. Now, I think they could not, for the following reasons.

On the 1st of May, the plaintiffs paid their broker, Mr. Lascaridi, the premium on this policy, by accepting a bill at four months, drawn by Lascaridi on them, for that premium and others: and, on the same day, the defendant debited Mr. Lascaridi with the amount of the premium and the stamp on the policy in the cash account between the company and Mr. Lascaridi. This was strictly in accordance with the usual practice; and the legal effect of this transaction is very accurately explained by Lord Wensleydale (then Parke, J.) in Power v. Butcher, 10 B. & C. 329 (E. C. L. R. vol. 21), 5 M. & R. 327. He there says, "By the course of dealing, the broker has an account with the underwriter; in that account, the broker gives the underwriter credit for the premium when the policy is effected, and he, as the agent of both the assured and the underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assured. The fact of giving credit in account by the broker to the underwriter, and the underwriter by the terms of the policy having acknowledged the receipt of the premium, are equivalent to actual payment." If the *457] opinion of that very *learned judge required any confirmation, it would be furnished by the universal practice by which premiums are recovered by the assured under the count for money had and received, without any reference to whether or not the year during which the broker generally has credit has run out, so as to make them payable in cash by the broker to the underwriter.

We have it, therefore, that, on the 1st of May, the plaintiffs had in legal effect paid the defendants the full premium for an assurance for a year on their ship. The defendants had also in the same manner received from the plaintiffs the value of the stamp-duty on the policy, and they had received the request-slip from the plaintiffs' broker, which, according to the practice stated in the case, amounted to a mandate to them to fill up the policy and keep it at their office until

sent for by the assured or their broker; and by retaining this request-note they accepted that employment. It would have been most dishonest if the defendants after all this had not prepared any policy. They were not so dishonest. They did fill up on stamped paper a policy in exact conformity with the authority in the request-slip. To this the two directors affixed their hands and seals; and the policy thus executed was left at the office, to be given to the assured or their broker when they should send for it. What more was there wanting to make this the complete deed of the two directors sealed and delivered to the use of the plaintiffs? It is admitted, that, when taken away by the assured, this would be a binding deed: but I must confess I cannot see how the act of the company's clerk in handing it to the broker's clerk could make it the deed of the directors, if it was not so before. If it were necessary that the delivery of a deed should be to the authorized agent of the party for whose use it is made, I have no difficulty in saying, *that, by handing over the slip according to the practice stated in the case, the assured constitute the insurance company their mandatories, and therefore that their officers are the authorized agents of the assured for the purpose of taking the deed: but Doe d. Garnons *v.* Knight, 5 B. & C. 671 (E. C. L. R. vol. 11), 8 D. & R. 348, shows that it is not necessary that there should be any such agency. [*458

Some of the judges in this court, if I understand them correctly, think, that, even if the underwriter was authorized and requested by the assured to draw up and execute the policy, and the underwriter did in consequence draw up and execute the policy accordingly, yet that the policy thus drawn up was in point of law not binding until the assured by some subsequent act showed his assent to the policy thus drawn up and executed. In this opinion, with all my respect for those who entertain it, I cannot concur. I am aware of no authority or legal principle preventing one party to an agreement from intrusting the other with authority to carry out any part of it for their mutual benefit. Where the agreement is, that a formal instrument shall be framed containing promises yet executory on both sides, there is great imprudence in trusting one side to draw up the formal instrument which is to be the record of the contract binding both, though even then I should think it rather an argument tending to the conclusion that no such authority was given in fact, than one tending to show it not operative in law. But, in the present case, the assured had performed all that they were to do: they had paid the premiums and the price of the stamp; and all that remained, was, that the underwriter should execute the policy. I can see no objection either in fact or law to trusting the underwriter to do this.

I have argued this on principle: but I own I think it decided by Doe d. Garnons *v.* Knight. In that case *the person in whose favour the mortgage was made did not know what kind of security his debtor was about to give him, but trusted to him to give what he could; yet the deeds secretly executed were held valid. Surely it cannot be said that the facts that the assured in this case stipulated for a particular deed, and that the deed was not secret, make it more invalid. [*459

It was asked in the course of the argument, what would be the effect

if the company were to fill up the policy erroneously, and the assured only discovered this on sending for the policy, it might be after the loss had occurred? As the slip sent to the company is not a memorandum of an agreement, but simply a request, it requires no stamp, and, without infringing the revenue laws, a case might probably be made for enforcing in equity a reformation of the policy, so as to make it conform to the terms contained in this mandate: but it is not necessary now to consider this point; for, the policy in the present case was filled up in strict conformity to the authority given.

The court below came to the conclusion that the policy was never perfectly delivered. I think they probably took a different view of the facts from that which I have taken. At all events, I cannot agree with them in that result. I think that, from the time when the two directors, in the presence of the attesting-witness, put their names and seals on the policy and left it in the defendants' office to be kept till sent for by the assured, the policy was binding as their deed on them, and on the defendant's company as represented by them.

I do the defendants the justice to believe that they would not have resisted this action on the ground that the policy had never been binding on them, though their counsel felt themselves compelled to *460] argue that *it was not. They really resist the action on account of what happened about the 8th of June,—a defence that, whether well grounded in law or not, is perfectly honourable: and I proceed to examine the effect of that. Here, as in the first point, I think the result really depends on a right appreciation of the facts. I must therefore again, at the risk of being long, proceed to point out what they are.

On the request-note or slip sent to the defendant's company were the letters C/A, which signified that the premium was by arrangement between the broker and the defendants to be entered in the cash account kept between him and the defendants. The whole practice as to the broker's accounts was proved in Beckwith v. Bullen, 8 Ellis & B. 683 (E. C. L. R. vol. 92),(a) and is thus stated in the report of that case, p. 685,—"The broker now keeps two accounts with underwriters, called the 'credit account' and the 'cash account.' Till within a few years, only one account was kept, which was that now called the 'credit account.' When the slip for any particular policy is signed, it is arranged between the broker and underwriter whether the premium is to go into the 'credit account' or the 'cash account.' In either case the broker becomes debtor to the underwriter for the premium at once; but the time and manner of payment are different in the two cases. If the premium goes into the 'credit account,' it is not payable till the end of the year. If before the end of the year any claim arising on one of the policies in the credit account is adjusted by the broker and underwriter, the broker has credit in the account against the underwriter for the amount of the loss thus adjusted, if the account is good for that amount, and at the end of the year, and not till then, the balance on the account, and the balance only, is due in cash from the broker to the underwriter, under a

(a) See Sweeting v. Pearce, 7 C. B. N. S. 449 (E. C. L. R. vol. 97),—in error, 9 C. B. N. S. 534 (E. C. L. R. vol. 99).

discount of 12 *per cent. If the premium, instead of going into the 'credit account,' goes into the 'cash account,' the [*461 custom is the same, except that the account is settled and the balance is due in cash at the end of the month, instead of at the end of the year, and the balance is paid, under a smaller discount." To make this complete, it should have been added that the broker receives credit in the account for a commission or brokerage of 5 per cent. on the premiums, and that, though the balance on the account is struck on the last day of the year, in the one case, or of the month in the other, the check for the balance is not actually given for some days afterwards.

This is in effect what is stated in the 11th paragraph of the case: but I have thought it desirable to quote the more detailed explanation given in Beckwith *v.* Bullen, because it more distinctly shows that the account (whether the cash account or the credit account) is one between the *broker* and the underwriter, into which the premiums received from *all* the clients of the broker go, and the balance on which is due from the broker to the underwriter, and in no way from any individual assured whose particular premium has gone into that account. This needs to be distinctly understood; for, it seems to me that the judgment of the court below to some extent proceeds on a misapprehension of the fact on this point.

Soon after the last day of May, the defendant's company sent in to Mr. Lascaridi a debit-note for the balance of the cash account for that month between him and them. It chanced that in that month there had been only this one transaction between them, and consequently that the account consisted of only one item: but the debit-note was, as it ought regularly to have been, in form a note debiting the broker with the amount of *his* account in May, and not a note debiting [*462 *him as agent for the plaintiffs with their premium, which as between the plaintiffs and defendants had been paid on the 1st of May, as explained by Parke, J., in Power *v.* Butcher, 10 B. & C. 329 (E. C. L. R. vol. 21), 5 M. & R. 327. On the presentation of the debit-note Mr. Lascaridi's clerk (whom we must assume, acted for him and by his authority) denied that any premiums were due. A second messenger was sent down with the policy. In the judgment below it is said,—"In due course the policy was sent by the company to Mr. Lascaridi's office:" but this I think is a misapprehension of the fact. The company did not send the policy down to the broker for any other object than to show it to him as a voucher to satisfy him that their note delivered to him of the amount of his private debt due from him to them was correct, and that there really had been a policy made on which a premium had been paid by the plaintiffs and was now due from the broker to the defendants. They did not send the policy to him as agent of the assured; nor was there any reason why they should have sent it to him as agent of the assured. What followed is stated in paragraphs 17 and 18. I cannot understand the statement in these paragraphs as meaning anything else than this, that Mr. Lascaridi's clerk (whom, as I said before, we must consider as representing him) stated to the company, not that the policy had never been ordered or executed, or was not binding, but that it had been put forward in error. He did not repudiate it, or deny that it was bind-

ing: but he requested the defendants, as liberal men of business, to do that which they were not bound to do, viz. to cancel a contract which was binding, but which had been made under a misapprehension; and the facts as stated in the case seem to me to be, that the defendants consented to this, and on the 14th of June endorsed on the policy a form of cancellation proper to express this.

*463] *I cannot, for the reasons I have already given, think that the policy remained then still uncancelled; and I cannot therefore agree with the court below in thinking that Mr. Lascaridi, if he had had the fullest authority from the plaintiffs, under seal or otherwise, so as to make him in law their alter ego, could at that time by a disclaimer have divested the execution of the deed, which had then, in my view of the matter, been already binding and making the company liable to the risk for more than a month. But I am also of opinion, that, if Mr. Lascaridi had had full power to disclaim on behalf of the plaintiffs, he did not in point of fact attempt to exercise any such power. What in fact he did, was, to enter into a fresh contract, professedly on behalf of the plaintiffs, to cancel the policy, receiving back the premium. This contract, if binding on the plaintiffs, would form a good defence to this action. It is stated in paragraph 24 that Mr. Lascaridi was not in fact authorized to make such a fresh contract. The question, therefore, and as it seems to me the only one left, is, whether Mr. Larcaridi was clothed by the plaintiffs with such apparent authority to cancel the policy as to enable him to bind the plaintiffs to the defendants. If so, the plaintiffs must fail in this action, and must seek redress in an action against Mr. Lascaridi for misconduct as their agent. If he had not such authority, the plaintiffs are entitled to succeed in this action, and the defendants' remedy, if any, is, by an action against Mr. Lascaridi, on the principle of Collen *v.* Wright, 7 Ellis & B. 301 (E. C. L. R. vol. 90), for warranting that he had the plaintiffs' authority to cancel, when he had not.

The court below express an opinion that the defendants "had a right to suppose Lascaridi to be invested with full power from the beginning to the end of the transaction, both with respect to the preliminary contract and the policy to be founded thereon." If the

*464] *facts are as I have above stated that I think them, I cannot agree in this. A broker employed to negotiate a contract is no doubt the proper party to receive and communicate all propositions during the course of the negotiation; and therefore, so long as the negotiation lasts, the other side are justified in supposing that he has authority to make or accept any propositions; and if, whilst it is still in negotiation, he cries off, the contract is at an end, or, rather, never is made: but, so soon as the negotiation is concluded and the contract made, all authority on that ground ceases. This, I apprehend, will be denied by no one; and I need not cite authorities for it. If, therefore, I am right in thinking that in fact the contract of insurance was complete, and the negotiation at an end on or soon after the 1st of May, Mr. Lascaridi could not on the 14th of June have authority to cancel the policy merely from his having been the broker who had originally negotiated it.

But, in this case, the policy was never taken by the plaintiffs from their broker Mr. Lascaridi, and consequently he had all the authority

of a broker permitted by the assured to retain the policy which he had procured. Now, I agree, that, by leaving the policy in the hands of his broker, the assured clothes him with *some* authority. I think, that, by leaving the policy in the broker's hands, the assured clothes him with apparent authority to act as his agent in all matters arising on the policy; as, for instance, to claim and receive returns of all premiums for short interest, or for the compliance with warranties; to adjust and settle losses, and to receive the amount of them in cash, or, if the assured is cognisant of the practice of Lloyd's, in account. Perhaps it may be put as high as to say that he is clothed with authority to do all that is incidentally necessary for carrying out the *contract in the policy thus left in his hands: see Richardson [*465
v. Anderson, 1 Campb. 43; Goodman *v.* Brooks, 4 Campb. 163. I do not wish to be understood as giving a decided opinion that he has so much authority; but there are at least grounds for so contending. But I am aware of no ground for saying, that, by leaving the policy in the hands of the broker, the assured gives him authority to cancel the contract altogether. An authority so extensive as that seems quite unnecessary: it is objectionable, as it would put the assured entirely at the mercy of his broker; and, until the argument of this case, I think I never heard it suggested that it existed. During the argument, I asked if there was any decision or dictum in support of this position. None such was quoted by the defendant's counsel. I am aware of none; and I think I am warranted in saying that no such decision or even dictum exists: and certainly on the present case there is no evidence that such an authority is given by practice. Nor can I think that the fact that the plaintiffs had on the 29th of April given Mr. Lascaridi written authority to cancel one assurance before the premium was paid or the policy executed, and procure another, clothed him with authority as their general agent to cancel any policy of theirs after the premiums had been paid and the risk had been covered for six weeks. It seems to me that the position contended for by the defendant amounts in effect to this, that the broker is the person contracting with the underwriter, free to make what bargains he pleases as to the contract made between them, and that the assured has no rights in the matter. But, so far is this from being the case, that, unless the policy be made in the broker's name (which in the present case it was not), the broker is a stranger to the contract, and cannot set up the loss on the policy by way of mutual credit, as an answer to *the claim against him of the assignees [*466
of the underwriter for premiums; not even when the broker has a lien on the policy: see Kosten *v.* Eason, 2 M. & Selw. 112; Lee *v.* Bullen, 8 Ellis & B. 692, n. (E. C. L. R. vol. 92).

The leave reserved at the trial was, to enter a verdict for the plaintiffs, if, on the facts proved, "the policy was binding upon the defendant's company, and had been cancelled without authority." For the reasons I have given, I think the plaintiffs have made out both propositions, and consequently that the rule to enter the verdict for them ought to have been made absolute; and I am therefore of opinion that the judgment should be reversed.

BRAMWELL, B.—I am of opinion that this judgment should be affirmed. The contract of assurance between the plaintiffs and the

company was to be in writing. No writing could be binding on either, unless binding on both: and it could not be binding on both till its terms were assented to by both. In my opinion no writing was ever agreed to by both in this case. I do not blame persons in trade or commerce because they disregard rules of law. They may find their profit in doing so, by a saving of trouble and otherwise. But those rules must be observed, and not evaded by supposing facts to exist which really do not. It is said in this case that the company or their clerks were agents of the plaintiffs to make and agree to the terms of the policy. With sincere respect, I think they were not. Is it a rule, that, where a written agreement is to be the agreement, and one party is to draw it up, he is the agent of the other to assent to its terms? Certainly not. Then why so here? Because the slip is the real agreement, and because the terms are certain, and because the policy is often left for a long time with the company, and because *467] the premiums are paid *between the various parties before the policy is delivered out, and for the convenience of so holding? To my mind that is not enough. I doubt if the printed terms of a policy might not be varied, as, by making something express which was before implied, by providing for a condition of things not before foreseen. But, further, suppose the defendant's company was a new company, or this a first dealing with them,—why is the printed policy to bind? Again, suppose a mistake in the policy,—wrong ship, wrong voyage, wrong sum insured? I know it would be said there was no authority in such case. But, what is to happen then? Is an action to lie against the supposed agents for not acting upon an authority given and accepted? And, what is to become of their claim to the premium? I am aware, that, if this reasoning is good, it would apply to a case where the policy made, but not delivered, was destroyed by the company after the loss was known. The best answer has already been given to this. Such dishonesty will not be practised. When it is, and becomes common, merchants will find it desirable to observe the rules of law, and will do so.

Doe d. Garnons *v.* Knight, 5 B. & C. 671 (E. C. L. R. vol. 11), 8 D. & R. 348, and similar cases, are distinguishable from this. There, the donee was to accept or refuse the gift as it was offered. Here, the plaintiffs had a right to have the document in certain terms to be arranged between them and the company.

MARTIN, B.—This is an appeal against a judgment of the Court of Common Pleas, which will be found reported in the 13th Common Bench Reports, New Series, p. 381. The material facts upon which the question depends are very simple. The plaintiffs had, in April, 1858, employed a broker called Lascaridi to effect an insurance upon *468] a vessel called the Leonidas. *He applied to the defendants, who are an insurance company in London; and a Mr. Sprange on their behalf signed a slip for 1000*l.*, part of it. Lascaridi afterwards prepared a separate slip for the defendants, and left it at their office, in order that a policy might be made out in the usual course; which is, that, upon receipt of the slip, a policy is prepared by the officers of the company, and kept by the company until sent for by the assured or his broker. The slip was as follows:—[His Lordship read it.] The letters C/A mean "cash account:" and the custom is

for the insurance company to credit the broker and debit him with the premium, which is payable on the 8th of the following month; and it is the practice, prior to the expiration of the credit, to send to the broker at the end of the month a debit-note for the premium, less a discount and the brokerage. Lascaridi was debited by the defendants with the amount of the premium and stamp-duty, and he on the 1st of May sent to the plaintiffs an account debiting them with it, for which they accepted a bill which was duly paid at maturity. In the course of a few days a policy in the form usually adopted by the company was filled up from the slip and dated the 1st of May, 1861. A fac-simile of the policy accompanies and is part of this case. It is in the common form, except as to the conclusion, which is as follows,—"In witness whereof, and that the said company are content with this assurance for the sum of 1000*l.*, we the undersigned directors of the said company for the London branch (on behalf of the said company, in pursuance of the powers and directions contained in the deed of settlement of the company), have hereunto set our hands and seals at London this 1st day of May, 1861." Then follow the signatures and seals of two directors, and an attestation-clause in the usual form.

*It clearly, therefore, purports to be a deed of two directors, who signed and attached their seals to it. [*469

On the 8th of June, a debit-note for the premium was sent by the defendants to the office of Lascaridi, with a request for payment. A clerk of Lascaridi stated that no premium was due. A second messenger was sent with the policy and the debit-note, and he was told by Lascaridi's clerk that the policy ought not to have gone forward. Upon the same day, a clerk of Lascaridi called at the defendant's office, and said that the policy had been put forward in error, and requested that it should be cancelled; and thereupon a memorandum of cancellation was endorsed upon it and signed by two of the directors, and it was agreed that Lascaridi should be debited with the expense of the stamp, and the policy was handed to his clerk in order that if possible a return of the stamp-duty might be obtained. On the 2d of September, a clerk of Lascaridi called at the office of the defendants and produced the policy, and stated that it had been cancelled by mistake, and wished it reinstated. He was told, if the ship was safe, there would be no objection; and he was requested to call again for an answer. At 8.20 that morning intelligence had arrived at Lloyd's that the Leonidas was stranded, and ultimataly she became lost. The defendants on hearing of the loss declined the risk or to renew the policy.

It is admitted that the plaintiffs never authorized the cancellation; nor were they aware of it; nor did they ever receive back from Lascaridi the premium, or any credit for it.

The question is, whether, under the circumstances, there is a contract binding upon the defendants. The Court of Common Pleas were of opinion that there was not; and in my opinion their judgment is right, and ought to be affirmed.

*The present policy is a deed. It purports to be signed, sealed, and delivered; and a delivery is essential to constitute a deed: until the sealed writing be delivered, it is not a deed. Ten [*470

things are stated in Sheppard's Touchstone to be necessarily incident to a deed, and delivery is the fifth:—"It is not necessary that it should be delivered to the person for whose benefit it is made; it may be delivered to any stranger for or on the behalf or to the use of him to whom it is made, without any previous authority: but a delivery must be made, *for otherwise, albeit it be never so well sealed and written, yet it is of no force:*" Shep. Touchst. 54, 57. Co. Litt. 35 b, and Comyns's Digest, *Fait* (A. 3), (A. 4), are to the same effect.

A case of Doe d. Garnons *v.* Knight, 5 B. & C. 671 (E. C. L. R. vol. 11), 8 D. & R. 348, was cited on behalf of the plaintiffs, which was supposed to be contrary; but it really is not. What it decides, is, that, when once a writing sealed has been delivered, its subsequent custody is an immaterial circumstance. In that case there was an actual delivery. The statement is, that the grantor called at his sister's house and asked his niece to witness or sign some parchment. He then produced it, placed it on the table, signed his name, and, putting his finger on the seal, said "I deliver this as my act and deed;" the niece being present and afterwards attesting the deed in his presence. In my opinion, this was an actual delivery to the niece: and what Mr. Justice Bayley, in delivering the judgment of the court, says, is, that, when an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed; and that delivery to the party who is to take by it, or *471] to any person for his use (by which I presume he *means an actual transfer of possession), is not essential.

Two paragraphs in the special case were relied on to show that the deed in the present case was delivered,—first, paragraph 7, which is a statement of the general course of business pursued by insurance-companies, viz. that a separate slip is prepared for each company by the broker of the assured, and a policy is afterwards prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker. There is no necessity in this case for expressing a positive opinion upon the point; but my strong impression is, that, so long as the policy remained in the hands of the company, it would be revocable. I can see no difference between the execution of a policy of insurance and the acceptance of a bill of exchange: and it has been expressly decided, that, although the drawee has written his name on the bill with the intention to accept, he is at liberty to cancel his acceptance at any time before the bill is delivered out: Cox *v.* Troy, 5 B. & Ald. 474 (E. C. L. R. vol. 7.) The 14th paragraph is merely this, that a policy in the form usually adopted by the company was filled up from the slip and dated the 1st of May, 1861. What was done with it, to whom it was handed, whether it was locked up or delivered to a clerk for Lascaridi or the assured or any other person, is not stated: all as to the matter of delivery is blank.

The above is the whole: and it seems to me that there is no statement, either express or affording ground for a reasonable inference that the policy under seal ever was delivered out at all. But, assuming that I am to speculate upon what really occurred, I believe it to

have been this,—that the policy, having been executed, was handed to a clerk or placed in *some place of deposit, in the expectation [*472
that Lascaridi would call or send for it; that, he not having sent for it, and the day for the payment of the premium having arrived, it, together with the note for the premium, were sent to his counting-house in the expectation that he would accept the policy and make the payment; whereupon, he fraudulently caused it to be stated that the policy was made out in error, refused to accept it, and afterwards had it cancelled.

I have very little doubt these are the real facts. Now, what is their operation? It was said that there was a delivery to the plaintiffs, the assured, themselves immediately upon the policy being sealed. I am clearly of opinion that this was not so. The defendants had nothing to do with the assured. Their dealings was with the broker Lascaridi. They were to hand the policy to him, and he was to pay them the premium: and I entertain no doubt they both legally might and actually would have refused to deliver the policy to the plaintiffs, stating, and stating truly, that they were strangers to them in the transaction, and would have referred them to their broker. It is true the plaintiffs had paid the broker: but the defendants had no notice of this; nor in my opinion would it have made any difference, for, I think the privity is between the underwriter and the broker until the latter gets possession of the perfect and completed policy. The result, in my opinion, upon the above assumed facts, is, that there was an inchoate delivery by the defendants, intended to be completed by handing the policy to Lascaridi and his acceptance of it and acquiescence in the form in which it was prepared; for, he would have had an undoubted right to object to its terms, if he so thought fit. It was offered to him: he refused to accept it. The inchoate delivery was therefore never completed; and there never was a binding *contract. It [*473
was not delivered as an escrow, which is a delivery upon condition. It was an incomplete or inchoate delivery, which was never perfected. Again, upon the day the policy was sent, the defendants were under no obligation to deliver it, except upon payment of the premium: and, as before observed, it would have been perfectly competent for Lascaridi to have then objected to the form in which it was written. It therefore seems to me impossible that the contract can be deemed complete.

I may add, that, in my opinion, the result would have been the same if the policy had been not under seal; and that the refusal by Lascaridi to accept would have prevented the obligation of a contract attaching upon the defendants. I also desire to add, that, in my opinion, where a contract is to be by deed, there must be a delivery to perfect it; and that this is a positive absolute rule of the common law, which nothing but an act of parliament can alter, and which in my judgment ought not to be frittered away by judicial decisions, to meet the supposed or alleged hardship of a particular case.

POLLOCK, C. B.—After the judgments which have been delivered by the other members of the court, it is unnecessary for me to repeat the facts of the case. I think the judgment of the court below ought to be affirmed, on the ground that the contract between the plaintiffs and the company, on which the action is founded, was not complete. It seems to me to be clear, that, though the policy was executed as a

deed, and in one sense delivered, yet it was not to be absolute and complete unless accepted by the other parties. The other parties to the contract were not bound by what had been done: they still had a right to object to any of the terms of the policy, to propose other
*474] terms, *or to decline accepting it altogether. And, whether the plaintiffs are considered as not having accepted the policy (which certainly they never did), or as having rejected it by their broker, to whom the conduct of the business was confided, and who acted by his clerk, the result is the same. I attach no importance whatever to the technical delivery of the deed. The rules which are applicable to a grant or a bond, or any instrument binding one party only, or to a lease or conveyance which may be intended to bind more than one party, do not in my judgment apply to a commercial instrument, because it happens to be under seal. If, when tendered to them, the plaintiffs had a right to object to any of the terms, or to reject it altogether, which I apprehend they had, then the delivery by the defendants was conditional on the plaintiffs' accepting it. The contract never was completed; and the defendants are entitled to our judgment.

For these reasons, I concur in the opinions expressed by the majority of the judges who heard the case argued in this court, that the judgment of the court below was right.

CHANNELL, B., concurred with the majority, and the judgment was Affirmed.

By the principal case as ultimately decided in the House of Lords (see Add. Cases, *post*, 861), it appears that the circumstances which go to make out a delivery are to be treated as indications of intention, and that the fact of delivery ultimately resolves itself into a question of intention. It is a very strong case upon this point: A policy was ordered by the plaintiff, it was made out and executed by the officers of the Insurance Company; but it remained in the office and was not taken away by the plaintiff, though it was the understanding of both parties that it should be handed over when sent for. It was held that this was a sufficient delivery to vest the title in the assured. Mr. Justice Field accurately defines the term so as to embrace such a case: "To constitute delivery the grantor must part with the possession of the deed, *or the right to retain it*:" Younge *v.* Guilbeau, 3 Wall. (1865) 636; Somers *v.* Pumphrey, 24 Ind. (1865) 231, 239, *et seq.*, and conversely, though handed over, if it be not such a deed as was contracted for, Fonda *v.* Sage, 46 Barb. (N. Y. 1866) 109, or, if merely for inspection, the transfer will not operate as a delivery: Berry *v.* Anderson, 22 Ind. (1864) 36. Where a grantor signs, seals, and acknowledges a deed, and has it registered, this ordinarily amounts to a delivery of the deed, though executed in the absence of the grantee and never placed in his possession: Snider *v.* Lackenour, 2 Ire. Eq. (N. C. 1842) 360; Gaither *v.* Gibson, Phillips, Law (N. C. 1868) 530; Rivard *v.* Walker, 39 Ill. (1866) 413; Duckwall *v.* Rogers, 15 Ohio S. (1864) 544. Not, however, if the grantor intended to retain the deed under his control: Hayes *v.* Davis, 18 N. H. (1847, published 1865) 600; Miller *v.* Blinebury, 21 Wis. (1867) 676; Barr *v.* Schroeder, 32 Cal. (1867) 609; Elmore *v.* Marks, 4 Veazey (Vt. 1867) 538; Russell *v.* Russell, 50 Barb. (N. Y. 1867) 445; Skillman *v.* Hamilton, 1 Bush (Ky. 1866) 248.

It was stipulated in an agreement

for the sale of land, that the deed should remain in the hands of a stranger until the grantor's death, and upon that event be delivered to the grantee. Under the articles of purchase the grantee took possession, but subsequently re-granted the land with an exception of the decayed and fallen trees. In trespass for entering upon the land to cut and carry away trees, the point for adjudication was whether he could make such an exception, and this question depended upon when the title passed; if at the time of the agreement and taking possession, his right to convey was perfect; if not until the death of the grantor and the delivery of the deed, he had no right to grant the land.

It was held that the title did not vest until the delivery, made in pursuance of the agreement: Hathaway *v.* Payne, 4 Tiff. (N. Y. 1865) 92, though upon delivery, the title is, by relation, deemed to have vested at the time of the original delivery to the stranger: Ibid.; Stephens *v.* Huss, 4 Sm. (Pa. 1866) 20, and an intermediate lien upon the title of the grantor is cut out: Ernst *v.* Reed, 49 Barb. (N. Y. 1867) 367.

The question, however, of an intervening encumbrance being cut out by the subsequent assent of the grantee, which relates back to the period when the grantor parted with his control over the deed, gives rise to a diversity of judicial responses. That the lien is intercepted; Ernst *v.* Reed, *supra;* Kirkman *v.* Bank of America, 2 Coldwell (Tenn. 1865) 397. In M'Kinney *v.* Rhoads, it was decided that unless the assignment was delivered before a judgment was entered, it could not take precedence, though putting the deed in the course of transmission to the assignee was treated as equivalent to delivery. C. J. Gibson: "Delivery is a constituent part of the act of execution—it is in truth the consummation of it—and as sealing alone makes not a deed, it may safely be affirmed, that it cannot divest an estate, it being an initial principle that a deed takes effect but from the delivery of it. Now the facts in Wilt *v.* Franklin were these. After an adverse verdict on Saturday, the debtor sealed a conveyance of his whole estate to a trustee who was neither present at, nor informed of, the transaction. The instrument was retained by the debtor or his son-in-law, who advised the measure, till the evening of the following Tuesday, when it was sent by a messenger to the trustee and shown to him the next morning. But on the intermediate Monday, judgment had been signed on a verdict, and the personal estate had been seized in execution by another creditor, notwithstanding which, the lien of the judgment, as well as that of the execution, was postponed to the title of the trustee, which was carried back to the ostensible period of the date—three days anterior to the period of perfect delivery. But the apparent time of the date is not the criterion. When false or impossible, the actual tradition ascertains the true time of it—with this limitation, it would seem, that the date averred be not anterior to the date expressed. Perkins, sect. 145 *et sequent.* It is due to the court to say that no objection was made by counsel on that ground, the stress of argument having been laid on the supposed want of assent. Delivery seems not to have been thought necessary at all; but it is not too much to assume that had the want of it been made a point, it would have been decisive. There was no pretence of actual delivery till the judgment had fastened itself upon the land and an execution had been laid on the chattels; and the fiction of relation to the first delivery, so as to give the deed effect from that time, is restricted to cases of necessity, being allowed but to avoid injustice

from intervening events, such as the marriage of a *feme sole* grantor—never to overreach an intervening title. The antecedent effect in any case, has been doubted; though the better opinion seems to be that it is allowable to prevent wrong from acts which the grantee could not restrain, the field of its operation is not to be enlarged by construction: Perkins, sect. 140–1. But there was in fact no pretence of antecedent delivery; for the conveyance was not put into the hands of the messenger till the judgment and execution had taken effect. That case, therefore, though sound in all that was decided, is not a precedent for the present. Before another jury the point will be the time when the assignment was deposited in the post-office": 5 Watts (Pa. 1836) 343.

But in Day *v.* Griffith, it was held that a delivery to the recorder for the grantee, though without his knowledge, would not transfer the title so as to cut out an attaching creditor who had intervened before the grantee accepted: 15 Iowa (1863) 104; Welch *v.* Sackett, 12 Wis. (1860) 243; Parmelee *v.* Simpson, 5 Wall. (1866) 81; Bank *v.* Webster, 44 N. H. (1862) 264.

C. J. Dixon, in Welch *v.* Sackett, *supra*, finds fault with the decision of Ventris, J., in Thompson *v.* Leach, 2 Ven. (1690) 198. The ground of objection that the title does not pass until the grantee assents, is answered by the array of cases already cited, but the real point of attack is rather to be found in a gloss put upon the case by C. J. Gibson in Read *v.* Robinson, 6 W. & S. (Pa. 1843) 329, than in the decision itself. The position was assumed that a lien upon an estate is better than the title upon which it attached, and to maintain this paradox he relies upon Thompson *v.* Leach. The facts of this celebrated case were simply that a tenant for life, upon whose estate a contingent remainder in tail was limited, surrendered to a subsequent tenant in tail male of a vested remainder. The junction of the two estates produced, by operation of law, a merger of the life estate in the remainder. The contingency happened during the interval between the date of the surrender and the assent of the remainder-man. If the title passed at the date of the surrender, though only temporarily, and liable to be revested by the dissent of the remainder-man, the life estate was extinguished by the merger at that instant, and no subsequent dissent could revive it. Had the life estate remained in existence, it might have been transferred back by the dissent of the remainder-man, but as the law had destroyed it he could do nothing to re-create it. The contingent remainder was cut out, or rather prevented from taking effect, by the want of a freehold to support it at the time the event happened, which removed the contingency, and gave it an opportunity to become a vested estate in remainder. It was to illustrate this point that Ventris, J., quoted Co. Litt. 356, *b.*, and for this purpose his citation is both pertinent and felicitous. A husband seised in right of his wife, discontinues the estate, the discontinuee, in the absence of the husband, reconveys to the wife. The effect of her obtaining possession of the estate, though by an inferior title, is to revive her original title; which antedates the discontinuance and cuts out everything dependent upon it. This is the doctrine of remitter, which C. J. Gibson evidently misunderstood; he calls the revesting of the title in the grantor on the dissent of the grantee a remitter! With this misconception of the doctrine, it is not to be wondered at that he failed to comprehend how the wife recovered her paramount title; it was not, as he thought, that she held under the reconveyance; had she done so,

his conclusion would have been correct, that the husband's dissent devested the estate reconveyed, or, as he termed it, 'remitted.' But being restored to her estate by this imperfect title, the law equitably considers her as clothed with her best title, and the subsequent dissent of the husband does not affect her estate; it would, had not the law remitted her in the interim to her paramount title, have devested the estate created by the reconveyance; as it is, the law has destroyed the estate before the husband had time to express his dissent.

The mistake was to apply the doctrine of merger and remitter to subsequent encumbrances. In the former cases an independent title is substituted, which has no connection with, and is not affected by, the one it replaces, whilst in the latter case the encumbrances fasten upon the title and remain in subordination to it. C. J. Gibson, misled by his notion of a remitter, held that a general assignment with preferences was valid, though the assignee refused to accept the trust, as equity would supply a trustee, and the preferred creditors had rights which attached before the assignee dissented, and that these rights could not be disturbed by devesting the assigned estate. This confusion of a preference, which is merely an encumbrance, with a paramount estate which cuts out, by virtue of its antecedent and superior title, the inferior estate, arose from a mistaken notion of remitter. There is not the faintest analogy between the rights springing from a remitter and the rights of an encumbrancer.

It is a misfortune that real-estate law should be brought into disrepute by the misapprehension of lawyers who do not take the trouble to understand the system. The fault should be attributed to the real delinquent; and this is certainly not Mr. Justice Ventris, who correctly applied and illustrated the law, but C. J. Gibson, who erroneously introduced a principle which had no application to the case before him. The decision of Read *v.* Robinson may, as Prof. Greenleaf suggests, be sustained upon the ground of a trust declared by the debtor, the execution of which the courts are compelled by statute to enforce: 2 Greenleaf's Cruise 306, *n.*

*475] *ORMSON v. CLARKE. *May* 12.

Tubular boilers for horticultural buildings had formerly been cast in several pieces,—a hollow ring with holes or sockets therein for the top and bottom, the sides being composed of vertical tubes cast separately, which were afterwards fastened into the sockets of the rings by means of iron cement. The plaintiff took out a patent for "an improvement in the manufacture of cast tubular boilers," which improvement (found by the jury to be a useful and beneficial one) consisted in casting the whole boiler in *one piece*:—Held by the Exchequer Chamber,—affirming the judgment of the court below,—that this was not the subject of a patent.

THIS was an appeal by the plaintiff against the judgment of the Court of Common Pleas in making a rule absolute to enter a verdict for the defendant.

1. The action was brought to recover damages for the infringement of letters-patent for an invention, bearing date the 19th of September, 1857.

2. The declaration alleged the grant of the letters-patent to the plaintiff for his invention intituled "An improvement in the manufacture of cast tubular boilers," the filing of a specification of the invention, and the infringement of the patent by the defendant.

3. The defendant pleaded,—first, not guilty,—secondly, that the plaintiff was not the true and first inventor,—thirdly, that the manufacture was not new,—fourthly, that Her Majesty did not by Her letters-patent, grant to the plaintiff the sole privilege to make, use, exercise, and vend the said invention,—fifthly, that the plaintiff did not, within six months next after the date of the said letters-patent, cause to be filed in the great seal patent office, an instrument in writing under his hand and seal particularly describing and ascertaining the nature of the said invention and in what manner the same was to be performed,—sixthly, that the said alleged invention described in the said specification was and is another and different invention to that for which the said letters-patent were granted,—seventhly, that the said alleged invention was not an invention for the sole working of any manner of manufacture within this realm, for which letters-patent could be granted according to the statute in that behalf,—
*476] eighthly, that the said alleged invention was *not nor is any improvement whatsoever, or in any way useful or beneficial to the public. Issue thereon.

4. The particulars of breaches delivered with the declaration were as follows:—

"That the defendant, between the 20th of September, 1857, and the 24th of November, 1861, did, at his factory and premises, The Eagle Iron Foundry, No. 23, Seel Street, Liverpool, in the county of Lancaster, manufacture a number of boilers in imitation of the invention described in the specification of the letters-patent granted to the plaintiff, and mentioned in the declaration; and that he did also, at the said factory and premises, or elsewhere, sell a number of the boilers in imitation of the said invention."

5. The defendant delivered with his pleas the following particulars of objections:—

"The following are the particulars of the objections on which the above-named defendant means to rely at the trial in support of the pleas in the said action,—

"(1.) That the defendant is not guilty of the alleged grievances:

"(2.) That the plaintiff was not the first and true inventor:

"(3.) That the alleged invention was not new:

'(4.) That the alleged invention was not a manufacture for which letters-patent could be granted; that the claim is not for any manufacture within the statutes; and that the plaintiff by his specification claims an application of an old principle to a new object:

"(5.) That Her Majesty did not grant the alleged letters-patent; that the specification enrolled was not sufficient; that the claim and title and description are repugnant and inconsistent, and unintelligible; that the articles described and the articles patented are different articles; and that the effects described cannot be produced:

*"(6.) That the invention was of no public benefit; that prior to the date of the letters-patent, the alleged invention was used [*477 by Mr. Edward Weeks, and afterwards at Mr. John Weeks's, Chelsea, at Whitechapel workhouse, at Mr. Vincent Skinner's, Bridewell Street, Bristol, and Paul Edward Wever's iron foundry, No. 163, Islington, and No. 79, St. Ann Street, in Liverpool, at Cottam & Hallen's, No. 2, Winsley Street, and No. 76, Oxford Street, at Mr. Shewin's, Sevenoaks, Kent, and elsewhere, in the following manner, viz. for the purpose of heating buildings by hot water."

6. The action was tried before Erle, C. J., and a special jury, at the sittings at Westminster after last Trinity Term, when the plaintiff gave in evidence the letters-patent and also a sealed and certified copy of his specification. The specification was as follows:—

"To all to whom these presents shall come, I, Henry Ormson, of &c., send greeting:

"Whereas, Her most excellent Majesty Queen Victoria, by Her letters-patent, bearing date the 19th of September, 1857, did, for Herself, Her heirs, and successors, give and grant unto me, the said Henry Ormson, Her special license that I, the said Henry Ormson, my executors, administrators, and assigns, or such others as I, the said Henry Ormson, my executors, administrators, and assigns, should at any time agree with, and no others, from time to time and at all times thereafter during the term therein expressed, should and lawfully might make, use, exercise, and vend, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and Isle of Man, an invention for 'An Improvement in the Manufacture of Cast Tubular Boilers,' upon the condition (amongst others) that I, the said Henry Ormson, my executors or administrators, by an instrument in writing under my or their or one of their hands and seals, should *particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, and [*478 cause the same to be filed in the great seal patent office within six calendar months next and immediately after the date of the said letters-patent.

"Now know ye, that I, the said Henry Ormson, do hereby declare the nature of the said invention, and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement thereof, that is to say:—

"This invention has for its object an improvement in the manufacture of cast-iron tubular boilers, and is applicable to boilers used for

the circulating of hot water for heating horticultural and other buildings, and consists in causing the upright tubes and the lower hollow ring (which connects the tubes together at their lower ends) to be all cast at one time, and thus to form one casting. The upper ends of the tubes have also part of the hollow ring which forms the upper water space cast with them. The lower hollow ring is cast with one or more projecting sockets to receive the ends of the return-pipes. That portion of the upper hollow ring which is cast with the tubes is suitably formed for receiving another casting, which is formed with a hopper for receiving the fuel, also an outlet for the passage of smoke and products from the fire, also with one or more sockets for receiving the ends of the flow pipes. The tubes at one part of the lower end of the boiler do not descend so low down as the others, and the lower hollow ring is formed at this part in such manner as to present an opening or doorway through, to admit of the fire on the interior of the boiler being readily got at.

"Having thus stated the nature of my said invention, I will proceed more fully to describe the manner of performing the same. [Here
*479] followed a particular *description, with references to the various parts of the drawings.]

"I have not thought it necessary to show the brickwork setting or the flues, as the same may be varied according to the judgment of the workman. I would remark that the form of the parts *a*, *b*, *c*, may be varied; but what I claim is, *the casting a boiler, such as is above described, in one piece.*"

7. The plaintiff, upon his examination, deposed as follows:—"I am a horticultural boiler and hot-water apparatus manufacturer. I have known tubular boilers for very many years past; for about seventeen or eighteen. Prior to the 19th of December, 1857, I never knew of any tubular boilers being made with a hollow ring in connection with the tubes cast in one piece. I never knew the upright pieces cast with the hollow rings. It is all for the purpose of circulating hot water. The old boilers were made by casting a lower ring with sockets, and upper ring with sockets, and then the upright tubes were jointed into the rings with iron cement. As a practical boiler-maker, I found that it was a great improvement in my trade to cast the hollow rings and the tubes in one piece, so as to avoid leakage and the liability to leak. The boilers last a longer time according to my mode: they are decidedly better. The boilers were made by Mr. M'Colley according to my instructions. I suggested this improvement, and then consulted an iron-founder, to see how it could be carried out. Mr. M'Colley carried out my invention under my direction. Prior to my commencing business on my own account, I was with Mr. Weeks, the horticultural builder, at King's Road, Chelsea. At that time I did not know of any mode of making a boiler similar to that which I afterwards invented. I have since the date of my patent largely made and sold these boilers; many hundreds of them.
*480] *I am at present extensively engaged in the supplying of boilers of that construction."

On being cross-examined, the plaintiff deposed as follows:—"Mr. Weeks's boilers were not similar to my own. The boiler used by Mr. Weeks, when put together, is not the same as mine. Mine is without

joints. Weeks's boiler is used for heating water, the same as mine, and the same as any other boiler. There is in Weeks's a hollow bottom ring, and a hollow top ring, and hollow vertical tubes: but they are connected with cemented joints. This model [produced] is the same as Weeks's in appearance, but in Weeks's there are joints at the top and bottom. Immediately after I took out the patent, I began to make my boilers. I had never made boilers to use them or vend them before then. I was book-keeper at Weeks's."

8. Henry M'Colley, a witness for the plaintiff, upon his examination, deposed as follows:—"I am the manager of the Cadogan Iron Foundry Works, at Stanley Bridge, King's Road, Chelsea. I have been in connection with the firm since it first commenced, about twenty-five years ago. They have been extensively employed in the casting of boilers. We have always been used to the casting of boilers ever since we commenced. At the request of the plaintiff (and after explanation by him of his principle), I constructed for him the tubular boiler which he has patented. I never knew of one being cast in one piece before I had done it myself. It did not take a very long time after I had made some experiments. I think we had one bad one in trying the experiments; and then I think we cast them very easily afterwards. I never knew, either at our own works or at the works of any other persons, the jointless tubular boilers made before. I was acquainted with these sort of castings. I was apprenticed to the trade of an iron-founder. I was *acquainted with hot-water casting [*481 before I went to this firm. I have had a very large experience in these matters. Before the invention of these jointless tubular boilers, there was a practical inconvenience in the tubular boilers with joints. I do not think it was tried before we tried it ourselves. They never tried to make boilers in one piece; they were made in joints,—the tubes used to be sent to us from the horticultural boiler makers to have them cast, and after that they passed out of our hands: we knew nothing about them. I was at the Cadogan Iron Works twenty-five years."

Upon cross-examination he further deposed as follows:—"I have cast boilers in all shapes; but I never cast any in one piece before, except the wagon or horse-shoe boiler. There were no tubes in those boilers. We never put the tubes or boilers together. We make the casting. Mr. Ormson, the plaintiff, came and asked me if I could cast the boiler in one piece. I said that I did not know, but that I would try to do it. It was an invention of his own, he said; and he should be glad if I would try and do so. I made some experiments, and afterwards I did it very easily."

Upon re-examination, he added,—"The doubt was as to whether we could get the air out of the core, the internal part of the boiler. The core is made of sand, and it is inside after the thing is taken out of the mould. In order to cast the tubes, it is necessary that they should be cast round something and that is called a core, which is made of sand. There was no difficulty in doing it. We have cast hundreds of them. We have a peculiar mode of our own of getting out the air, which we do not like to reveal to every one."

9. Charles Hodge, a witness for the plaintiff, deposed as follows:—"I have an office in the city for the sale of machinery in general,

*482] cast-iron machinery and *other work. Prior to 1857, I was familiar with the manufacture of cast-iron boilers. I had been in the Cadogan Iron Foundry, which has just been talked about, in the year 1849. Prior to 1857, I made cast-iron tubular boilers, the top and the bottom rings to receive the tubes: those tubes are generally of country make. I make tubular boilers for Mr. Weeks, of the King's Road, Chelsea,—a great number. I suppose I have known Mr. Weeks for twenty-seven years. I was a manager at the Bramley Works before the year 1839; and I worked for Mr. Weeks's father: and Mr. Weeks followed his father in the business. Between 1845 and 1857, I made for Mr. Weeks the tubular boilers which he ordered, that is, the tubular ends and the rings. I never saw or heard of any tubular boilers being made like the plaintiff's before 1857. I never knew of any boilers being made with a hollow ring and the tubes cast in one piece before 1857. I considered casting it in one piece a very great improvement. According to the old arrangement, they were very likely to spring a leak in the caulking where the tubes were received into the top and bottom rings. Sometimes those pipes were broken in caulking."

On cross-examination, he further deposed as follows:—"I have not read the specification of Ormson; but I have seen his boilers at the iron-foundry, and at Mr. Ormson's yard. My knowledge of casting would tell me that they were made in one piece. When I say I have known boilers before like the plaintiff's, I mean not cast in one piece. I made boilers for Mr. Weeks on the old plan. I have seen many of those boilers in operation."

10. John Imray, a witness for the plaintiff, deposed as follows:—"I am a mechanical and consulting engineer, and have been in practice for a great number of years. I have had great experience in inven-

*483] tions of *this kind. I have been employed by Government for seven years in the office of woods and forests. I have had experience in heating many public buildings under Government; Belfast prison, the Edinburgh prison, the Perth prison, the Manchester industrial schools, and buildings at Swindon. I was acquainted, previous to the taking out of the plaintiff's patent, with the tubular boilers for circulating hot water which were before in use. All the makers of boilers used to come to the office in which I was employed, to show their models. I always declined to use cast-iron boilers on the old plan, on account of their being jointed; because I was afraid of leakage taking place. I have heard of it very often taking place. I have always refused to employ these jointed things. My opinion was against them. The perpendicular tubes and the rings above and below them were jointed generally by iron cement. I have seen that the action of great heat on the joints would have a tendency to weaken the joints and to cause leakage. I have often seen joints expand to heat; and I have always been afraid of their giving way. It was for that reason that I, having the responsibility of selecting boilers for these public buildings, declined using the jointed boilers. Previously to the specification of the plaintiff's patent, I had never known of any tubular boilers being made jointless. I have looked carefully at the specification of the plaintiff's patent. I would undertake to make the plaintiff's boilers myself, as an iron-founder, from

the specification. There are a number of small points of manipulation which require an experienced workman to understand and to perform. There are details of manipulation for letting off the air and the gases, which only a practical founder would undertake to do. In my judgment, an experienced and practical founder would be able *unquestionably to make these boilers in accordance with that specification. In the patent of the plaintiff, the joints never [*484 come in contract with the fire: his only joint is at the cover of the boiler, which is clear of the fire. In point of fact the plaintiff saves the caulking joint at the top and bottom of each tube."

Upon cross-examination, he further deposed as follows:—"In this apparatus for heating horticultural and other buildings, the water ought not to be raised to a boiling point. The heat outside the tubes may be very considerable. I rather think the heat would be stronger at the top joint. It depends very much on circumstances. If the flame passes up the centre of the flues, it might strike very fiercely on the top. I have seen steam-boilers with cemented joints made at the bottom give way. At the bottom of those boilers, the heat is not greater than in these boilers. Houses are heated by steam-pipes: they are jointed by cement, and sometimes by lead joints; but those joints are not exposed to the flame. Sugar-houses are, I believe, heated by boilers with cemented pipes. Practical iron-founders would know how the air is got out of the plaintiff's castings."

11. Frederick Bramwell, a witness for the defendant, deposed as follows:—"I am a civil engineer. I have had a good deal of experience in castings of iron in general, for very many years. I have read the specification of this patent of plaintiff's. I find no special directions given in the specification as regards casting. I find nothing that I did not know from my ordinary knowledge as acquainted with iron-foundries,—nothing whatever, that is, as to the mode of casting. There are certain phases in it, one being that a core may be removed through certain openings; but those are matters not disclosed by the specification, but are matters within the knowledge of any iron-founder, if he *had given to him a casting of this form to make. They [*485 are not original; they are already things within the knowledge of any workman in that business. It was casting in one piece what had been cast in several pieces. It was a matter of every day's practice in the iron-foundries, viz., the casting sometimes in one piece and sometimes in two, for articles of different kinds. I do not mean tubular boilers. If you have got a sound casting made, probably you would rather have it in one piece than the one with the joints; but, if you have got the thing to make, I very much doubt whether I would rather run the risk of waste of castings and unequal contractions by making it in one piece, instead of with joints. For example, if I have got this boiler to make in one piece, and in making it if one of these tubes proved defective,—one out of twenty, as there may be,—the whole of the other tubes are wasted for that one. If, on the other hand, I cast each of these tubes separately, and if I get one tube bad, I have only wasted that one tube. But, irrespective of that, I should be much more likely,—in fact I may say with certainty I could cast twenty tubes separately, and all the twenty tubes would be sound."

The Lord Chief Justice then asked the witness,—"Is there any utility, in your judgment, in the casting for which the plaintiff has taken out his patent, rather than in the casting as practised before?" The witness replied,—"If I were a manufacturer, I do not think I should elect to use the plaintiff's mode: but, if I were a customer, and the two boilers were presented to me, I should like to buy the plaintiff's boiler, having proved the plaintiff's boiler to be sound. I should be very suspicious of a contraction in it. I should know that it was more likely to suffer from a contraction than the other. As a manufacturer, I should not select the plaintiff's mode, unless I had a
*486] very high *price offered to me for it. But, if it was sound, I should prefer it for use, as a purchaser."

On cross-examination by counsel for the plaintiff, he further deposed as follows:—"If I had a boiler all in one piece, I would prefer it. It is merely this which would influence me in my choice, that, if it was jointed, I should have two thicknesses of metal, and in consequence of the joint the fire would not operate on the water within the boiler with the same effect as when there was only one thickness of metal. I do not think failure of joint would sometimes arise from the expansion of the cement. I have known instances of a joint being over caulked, and the outside of the socket has burst; but it has been done in the act of caulking, and not subsequently, as far as my experience goes. I have known cement expand by heat; but, if it expands under the influence of heat, it is while it is under some very great amount of heat. But any alteration of form caused by internal effects may produce a fracture."

12. The defendant, upon being examined by his counsel, deposed as follows:—"I am a civil and hydraulic engineer and iron-founder. I have been in business on my own account as an iron-founder since 1858. I originally cast the whole boiler in one piece as the plaintiff does, and in that I found inconvenience, from the difficulty of finding a passage for the air and gas to escape; and I found that, by adopting the process of casting the lower ring separate, I remedied the inconvenience to a great extent; but I believe, had I been aware of Mr. Weeks's plan, I should have adopted that. For my improvement, I have obtained a provisional protection." The Lord Chief Justice here interposed, observing,—"That also may be an extremely valuable patent as an improvement upon a patented invention: but then
*487] the improvement on the patented *invention is an infringement of the original patented invention as far as it takes up the invention and embodies it in its improved process. Mr. Clarke seems to have had some substantial improvement in what he calls the water walls of the fire; but, if he has taken the substance of the plaintiff's patent in casting with the vertical tubes, he has infringed the plaintiff's patent quoad that part of the invention, notwithstanding his having a substantial improvement in another respect."

The defendant, on his cross-examination, admitted that he advertised his boilers as jointless boilers, and that he had made six or eight boilers exactly like the plaintiff's; that four failed in the casting, two were broken up, and he sold two; and that he now made and sold boilers in which the top ring and vertical tubes are cast in one piece,

and the lower ends of the tubes are jointed into the upper side of the lower ring.

13. The Lord Chief Justice reserved leave to the defendant to move to enter a verdict for him, on the ground that the alleged invention of the plaintiff was not the proper subject-matter for a patent; and that there was, as to the boilers now made by the defendant, no evidence of infringement to go to the jury: and he left to the jury the following questions,—first, whether the invention of the plaintiff was an improvement of any use or benefit to the public,—secondly, whether the defendant infringed the plaintiff's patent.

14. The jury found a verdict for the plaintiff on both points, subject to the leave so reserved.

15. In Michaelmas Term last, the defendant obtained a rule nisi to enter a verdict for him, on the ground reserved at the trial, that there was no invention which was new and the subject of a patent, and no invention to sustain the patent; that, if any *invention, the specification was insufficient, and did not describe it, and did not disclose any invention the subject of the patent; and that the castings of the defendant were not an infringement. [*488

16. The rule came on to be argued in the Court of Common Pleas, in Michaelmas Term last, and was made absolute: 13 C. B. N. S. 337 (E. C. L. R. vol. 106).

The appeal was argued in the Exchequer Chamber before Pollock, C. B., Crompton, J., Martin, B., Bramwell, B., Channell, B., Blackburn, J., and Mellor, J.

Aston (with whom was *Shee*, Serjt.), for the plaintiff.—The patent is for "an improvement in the manufacture of cast tubular boilers." The old boiler for horticultural purposes was formed of a hollow ring at the top and bottom, having sockets into which were fastened by means of iron cement upright cylinders. The plaintiff's improvement consists in the casting the whole in one piece in the manner described in his specification. The infringement complained of, is, that the defendant casts the upper ring and the vertical cylinders in one piece and the bottom ring in another. [CROMPTON, J.—The question is, not whether there has been an infringement, but whether that which the plaintiff claims can be the subject of a patent.] It is true, as was held in Harwood *v.* The Great Northern Railway Company, 29 Law J., Q. B. 193 (in error, 31 Law J., Q. B., 198), and Horton *v.* Mabon, 12 C. B. N. S. 437 (E. C. L. R. vol. 104), that the application of a known article to an analogous purpose is not the subject of a patent. But the present case is distinguishable. [POLLOCK, C. B.—The plaintiff's invention consists in casting in one piece an article which before was cast in several pieces.] Casting a boiler *such as is described* in one piece. A specification is to be construed in a fair and candid spirit, *and not to be scanned with the astuteness of a special demurrer. The evidence showed that the plaintiff's mode of operating was a manifest improvement. The amount of improvement is for the jury, and not for the court: Losh *v.* Hague, 1 Webster's P. C. 203, Hindmarch on Patents 95, 96; Steiner *v.* Heald, 6 Exch. 607. [POLLOCK, C. B.—You do not claim to have made an improved boiler: all you claim is casting it in one piece instead of in several pieces. BLACKBURN, J.—The patent is not for the *mode* of casting, but for doing it [*489

in one piece.] In Smith *v.* The London and North-Western Railway Company, 2 Ellis & B. 69, the specification of a patent for improvements in wheels described the invention as consisting of a mode of forming a wheel of one solid piece of wrought iron, by means of welding pieces of wrought iron together so as to form the rim, spoke, and nave into one compact mass. The defendants used a wheel made by welding pieces of wrought iron together so as to form a single compact piece of wrought iron: the mode of forming the nave was the same as that in the specification; the mode of forming the rim was different. It was held, that, it appearing that the mode of forming the nave was a material, new, and useful part of the invention, the use of it by the defendants was an infringement of the patent, although in the specification, after describing the whole structure, the invention was stated to consist in the circumstance of the centre boss or nave, arms, and rim of the wheel being wholly composed of wrought iron welded into one solid mass "in manner hereinbefore described." It is difficult to distinguish that from the present case. [CROMPTON, J.—The question there was, whether the defendants had been guilty of an infringement, not as to the construction of the specification.] The patent was for an improved wheel; and the improvement consisted in *490] the peculiar mode *of welding. The jury here found that the plaintiff's mode of casting was an improvement, and that clearly is the subject of a patent. Brunton *v.* Hawkes, 4 B. & Ald. 541 (E. C. L. R. vol. 6), shows that a patent may be good, though the claim is for the application of a known thing, provided the mode of application be new and beneficial.

Montague Smith, Q. C. (with whom were *Webster* and *Thrupp*), contrà, was not called upon.

POLLOCK, C. B.—We are all of opinion that the judgment of the Court of Common Pleas should be affirmed. I was somewhat surprised to hear Mr. Aston claim Brunton *v.* Hawkes as an authority in his favour. It has nothing whatever to do with this case. I think it is extremely likely that this is a very useful improvement; and, if the patent had been taken out for an improved mode of casting tubular boilers in one piece, probably it might have been sustained. But here the only claim is, "I claim the casting a boiler, such as is above described, in one piece," making no claim to the boiler if in several pieces. Mr. Aston contends, that, looking at the description in the specification, and at the evidence, the thing described as cast in one piece is different from what had been done before. The only question reserved for us is, whether there could be a patent for a boiler as above described cast in one piece. We are all clearly of opinion that that is not the subject of a patent. For these reasons, we confirm the judgment of the court below. Judgment affirmed.

*LEAKEY and Others *v.* LUCAS and Others. *May* 12. [*491

The declaration,—after reciting that certain persons intended to apply to parliament for leave to bring in a bill for making and maintaining waterworks, and incorporating a company for the supply of water,—set out an agreement between the plaintiffs (an engineer and solicitors) and the defendants (contractors), whereby it was agreed that the defendants should be the contractors to do the proposed works, and should provide the parliamentary deposit, and that in the event of the intended act not being obtained, the defendants should pay a sum not exceeding 300*l.* towards the expenses in endeavouring to obtain the act; and that the plaintiffs should not make any charge for work done or money paid against the provisional directors of the intended company, or beyond the said 300*l.* against the defendants.

Plea, that the plaintiffs, having incurred costs to the amount of 300*l.* in endeavouring to obtain the act, refused to continue and ceased from continuing such endeavours, on the ground that no one would provide them with funds to pay the counsel's fees, whereupon it became necessary that the bill should be lost for want of further prosecution, or that the defendants should prosecute it; and that the defendants accordingly employed other solicitors for that purpose, and in so doing incurred costs to an amount greatly exceeding 300*l.*, but that the bill was thrown out. The plea concluded with a general averment that all things had happened to entitle the defendants to employ the last-mentioned solicitors, and to make the said payment a performance by the defendants of the agreement so far as related to the 300*l.*:—

Held by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the plea was a good answer to the action,—the continuance by the plaintiffs of all reasonable endeavours to obtain the act being a condition precedent to their right to call upon the defendants for the 300*l.*, and the plea showing that they had failed to use such endeavours.

ERROR from the Court of Common Pleas.

The first count of the declaration stated, that, before and at the time of the making of the agreement thereinafter mentioned, it was intended by divers persons that application should be made to parliament in the then ensuing session, that is to say, in the session of parliament which was held in the 23d and 24th years of the reign of Her Majesty Queen Victoria, for leave to bring in a bill for making and maintaining waterworks for the supply of the inhabitants of divers places in the county of Kent with water, and for incorporating a company with all necessary powers for that purpose, and, amongst other things, for authorizing the making and constructing of a wharf, engine-house, pumping-station, and divers reservoirs, cuts, trenches, pipes, aqueducts, and other works necessary and proper for the said undertaking: That thereupon, by an agreement in writing, bearing date the 14th of January, 1860, then made by the defendants and the plaintiffs, it was agreed between the defendants (therein described as contractors), the plaintiff Alfred *Meeson (therein described as civil engineer), and the other plaintiffs (therein described as [*492 solicitors), for the proposed waterworks, that, provided the said intended act of parliament should be obtained, the defendants should carry out the whole of the said works, and that the price to be paid to the said contractors for the pipes to be provided and fixed complete, including all charges, should be 11*l.* per ton, and that the said contractors should perform the remainder of the works of every description that should be required to be done at prices in the same proportion, such last-mentioned prices to be settled by the plaintiff Alfred Meeson in case any dispute concerning the same should arise; and that the said contractors should take payment for the said works as follows, that is to say, one eighth of the amount in paid-up shares of the said intended company, and the remainder in cash; and that the said contractors should provide the parliamentary deposit, which

should be returned to them in full at the earliest period; and that, in the event of the said intended act of parliament not being obtained, the said contractors should pay a sum not exceeding 300*l.* towards the expenses in endeavouring to obtain the said act; and that the said engineer and solicitors should not make any charge for work done or money paid against the provisional directors of the said intended company, or beyond the said 300*l.* as aforesaid against the said contractors; but that nothing in the said agreement should prevent the said solicitors and engineer from receiving their proper charges out of the funds of the said intended company: Averment, that the said intended act of parliament had never been obtained, and that all matters and things had been done and had happened, and all times had elapsed necessary to entitle the plaintiffs to maintain this action, and
*493] to recover from the defendants the said *sum of 300*l.*, yet the defendants had not paid the said sum, or any part thereof, &c.

Second plea to the first count,—that, after the making of the said agreement, and while the defendants and the plaintiffs were prosecuting in parliament the said bill, and before it was known whether the said bill would or would not be passed into an act, the plaintiffs James Shirley Leakey, George Chapman, and Charles Harwood Clarke, having incurred costs to the amount of 300*l.* in endeavouring to obtain the said act, refused to continue and ceased from continuing such their endeavours, and did not nor would make any further endeavour to obtain the said act, upon the ground that no one would provide them with funds to pay counsel's fees and fees of the Houses of Parliament; whereupon it became necessary either that the said act should be lost for want of further prosecution of the said bill, or that the defendants should prosecute the same; and thereupon the defendants necessarily employed other solicitors, to wit, Messrs. Gregory & Co., to prosecute the said bill, and thereby endeavour to obtain the said act, and did by the said Messrs. Gregory & Co. as their solicitors reasonably prosecute the said bill in parliament, and thereby reasonably endeavour to obtain the said act, until the said bill was thrown out in the House of Lords and was lost, and the obtaining of the said act became impossible: That, in and by their said endeavours, the defendants incurred and became liable to pay divers costs and charges to the said Messrs. Gregory & Co. for work done and disbursements made by the said Messrs. Gregory & Co. for the defendants, at their request, in and about so prosecuting the said bill and endeavouring to obtain the said act, amounting to a large sum, exceeding 300*l.*, to wit, 697*l.* 3*s.*, which last-mentioned sum, after the said bill
*494] was lost as aforesaid, and before this *suit, the defendants paid to the said Messrs. Gregory & Co., such payment being a payment made by the defendants towards the expenses in endeavouring to obtain the said act according to and in fulfilment and performance of their said agreement: That the said expenses which they the defendants so paid to the amount of 300*l.* and upwards were necessary and reasonable expenses, and were incurred by reason of the said plaintiffs James Shirley Leakey, George Chapman, and Charles Harwood Clarke having ceased and omitted to endeavour to obtain the said act as aforesaid: That the said James Shirley Leakey, George

Chapman, and Charles Harwood Clarke so ceased and omitted as aforesaid without the consent and against the will of the defendants: And that all things necessary happened to entitle the defendants to employ the said Messrs. Gregory & Co. as aforesaid, and by them to endeavour to obtain the said act as aforesaid, and to make the said payment a performance by the defendants of the said agreement so far as it related to the said sum of 300*l.*

The plaintiffs demurred to the second plea, the ground of demurrer stated in the margin being, "that the alleged payment by the defendants to the said Messrs. Gregory & Co. was no performance by the defendants of their said agreement with the plaintiffs." Joinder.

The Court of Common Pleas having given judgment for the defendants upon this demurrer, the plaintiffs brought a writ of error, which was argued in the Exchequer Chamber before Pollock, C. B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Mellor, J.

Macnamara (with whom was *Mellish*, Q. C.), for the plaintiffs in error.(*a*)—It stands admitted upon the *record that the plaintiffs did use their best endeavours to obtain the act of parliament contemplated by the agreement, and had incurred expenses exceeding the sum mentioned therein, and that they failed in *obtaining an act. The plea, it is said, discloses a defence on two grounds,—first, that it shows performance of the agreement on the part of the defendants,—secondly, that, at all events, it discloses a non-performance by the plaintiffs of that which is a condition precedent to their right of action. The plea, it is submitted, clearly does not show performance. The payment of moneys to third persons not the plaintiffs' agents, nor at their request or with their assent, cannot be set up as a performance of the agreement on the defendants' part. Then, does the plea show any default on the part of the plaintiffs? It is submitted that it does not,—or, at any rate, not such a default [*495 [*496

(*a*) The grounds of error stated were as follows:—

"That the plea is bad, because the agreement gave the plaintiffs a right to claim a payment of the 300*l.* in the event of the bill being thrown out by the legislature for some other cause than the plaintiff's default, after they had incurred costs to the amount of 300*l.* in endeavouring to obtain the act:

"That the agreement did not bind the plaintiffs to find funds for the prosecution of the bill until its rejection by the legislature:

"That the plea confesses the happening of the contingency upon which the defendants' liability to pay the 300*l.* depended, without avoiding the effect of such confession:

"That the costs and expenses of the defendants in and about prosecuting the bill after the plaintiff's refusal to proceed further in the matter, were incurred solely on the defendants' behalf, and the payment of such expenses to Messrs. G. & Co. cannot be set against the 300*l.* already incurred and expended by the plaintiffs in endeavouring to obtain the act, and of which the defendants had the benefit in their further prosecution of the bill:

"That it is not expressly provided by the agreement, nor is it implied by its terms, that such a payment as that alleged in the plea to have been made by the defendants should be a payment or equivalent to a payment of the 300*l.* to the plaintiffs:

"That it is not stated in the plea either that the plaintiffs assented to such payment being made to Messrs. G. & Co. on the plaintiffs' behalf, or that the plaintiffs accepted it as a payment in performance of the defendants' agreement:

"Also that the plea cannot consistently with the rules of pleading be read as a plea of the plaintiffs' non-performance of the agreement; but that, if it can be so read, it is bad, for that the plea confesses the plaintiffs' performance of the agreement and the happening of the contingency upon which the defendants' liability depended, and alleges nothing in avoidance thereof, and for that the plea admits performance of the agreement by the plaintiffs and an enjoyment of such performance by the defendants."

as the defendants can urge by way of defence against the plaintiffs' claim to the 300*l.* There is nothing in the agreement to compel the plaintiffs to advance more than 300*l.* towards the expenses of obtaining the act. They are solicitors and engineers employed in the ordinary way to solicit an act of parliament: it was no part of their duty as such to find money for the purpose. An attorney may always abandon an action or suit, if proper advances are not made to him, on notice. In Vansandau *v.* Browne, 9 Bingh. 402, 2 M. & Scott 543, it was expressly held that an attorney is not compelled to proceed to the end of a suit in order to be entitled to his costs, but may, upon reasonable cause and reasonable notice, abandon the conduct of the suit, and in such case may recover his costs for the period during which he was employed. That decision was deliberately come to after a full consideration of all the earlier authorities. If it had been intended that the plaintiffs should take upon themselves this extraordinary amount of responsibility, the agreement should have provided for it. The agreement does not even stipulate, that, in the event of the act *497] being obtained, the plaintiffs shall be the solicitors and *engineers of the company, though it is stipulated that the defendants shall be the contractors for the works. [BLACKBURN, J.—Is there not an implied undertaking on the part of the plaintiffs to use all reasonable means and endeavours to obtain the act?] But not to supply the funds. [CROMPTON, J.—Are they to relax their efforts after having expended 50*l.*, and then call upon the defendants?] Undoubtedly not. The event contemplated, of the bill being thrown out, has happened, and the plaintiffs have incurred expense exceeding 300*l.* [POLLOCK, C. B.—The rule laid down in Vansandau *v.* Browne is a very reasonable one, provided there be no special agreement. There is no provision here entitling the plaintiffs to call upon the defendants to advance money from time to time. BRAMWELL, B.—This is not a case of attorney and client; Vansandau *v.* Browne, therefore, can have no application.] It was not reasonable to expect that the plaintiffs would find money for the purpose of promoting the scheme. [POLLOCK, C. B.—Nor does the agreement impose any such obligation on the defendants. BLACKBURN, J.—I think the agreement does necessarily contemplate that money shall be advanced by the plaintiffs. POLLOCK, C. B.—The defendants have entered into a specific agreement, under which they are liable to recoup the plaintiffs to the extent of 300*l.* in the event of the latter failing, after making every reasonable effort, to get the bill passed. BRAMWELL, B.—If your argument be well founded, the plaintiffs might go on with the business until 300*l.* had been expended, and then call upon the defendants to repay them that amount, and relinquish all further efforts. That could never have been contemplated.] Unless the court can see upon the face of the agreement some duty cast upon the plaintiffs to continue the advances, it cannot be introduced by intendment. *498] [BLACKBURN, J.—Under *the old system of pleading, the plaintiffs must have averred, that, although they had done all in their power to obtain the act, yet they had failed to do so. The question is, have you done enough to entitle you to call upon the defendants for the 300*l.*, not whether you were bound to go on.] The defendants might possibly have had a remedy by cross-action. All

that the plea alleges, is, that the three solicitors stopped. That clearly does not go to the whole consideration. [CROMPTON, J.—If one cannot sue, none can.] For anything that appears, the bill was lost, not by any default on the part of the plaintiffs, but on the merits.

Bovill, Q. C. (with whom was *Kay*), contrà, was not called upon.

POLLOCK, C. B.—We are all of opinion that the judgment of the Court of Common Pleas should be affirmed. The parties to this agreement, though some of the plaintiffs happen to be attorneys, do not stand in the relation of attorney and client. In truth they are co-adventurers. It appears to me to have been the intention that the plaintiffs should solicit the projected bill, and should go on at their own expense and endeavour to get it passed, and, if, after every reasonable exertion, the attempt should be unsuccessful, the defendants should pay 300*l.* towards liquidation of the outlay. Instead, however, of going on and using their best endeavours, after going a certain length, the plaintiffs stopped for want of funds. I see nothing in the agreement to entitle them to call upon the defendants to supply them.

The rest of the court concurring, Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Trinity Term,

IN THE

TWENTY-SIXTH YEAR OF THE REIGN OF VICTORIA. 1863.

The Judges who usually sat in banco in this Term, were,—

ERLE, C. J., WILLES, J.,
WILLIAMS, J., BYLES, J.

HARRIS and Others, Appellants; ANDERSON and Others, Respondents. *June* 5.

The plaintiffs' vessel, whilst being towed into a harbour by a steam-tug, got aground, and the defendants' vessel, which was being towed in at the same time by the same tug, astern of the plaintiffs' vessel, without any active default on the defendants' part, struck and damaged the plaintiffs' vessel:—Held, no evidence to go to a jury of negligence for which the defendants were liable.

THIS was an appeal from a decision of the county court of Kent, at Faversham, in favour of the above plaintiffs for the sum of 31*l.* 10*s.* 2*d.*

The action was brought to recover damages sustained by the plaintiffs by reason of their vessel, the Venilla, having come into collision with the defendants' schooner, the Alice, under the circumstances hereinafter appearing.

*500] *The plaint-note contained the following particulars of the plaintiffs' demand:—

"For damages sustained by the plaintiffs by the negligence or misconduct of the defendants or their servants in the management of the defendants' schooner, Alice, so that the said vessel came into collision or ran into or against the plaintiffs' brig Venilla, on the 29th of April, 1862, 31*l.* 10*s.* 2*d.*"

The cause was tried by a jury before the judge of the said county

court on the 6th of March, 1863: and at the trial the following evidence was given on the part of the plaintiffs:—

William Warner said that he was master of the plaintiffs' brig, the Venilla; that Faversham Creek, where the collision happened, was in the form of a horse-shoe, there being a buoy on the inner edge of the centre of the bend of the creek, Faversham Wharf being situate at one end of the creek, and the other end being towards the sea; that, at this end, a buoy called the Horse-buoy is placed; that the brig arrived at the Horse-buoy (having on board a cargo of coals) on the 28th of April, 1862, and on the same day witness proceeded to Faversham and saw the harbour-master of the port, and engaged from him a steam-tug, of which he was master, to tow the Venilla up the creek; that, on the morning of the 29th, the tug, with the witness and the harbour-master on board, proceeded to the Venilla, and laid hold of her; that the witness went on board the Venilla, and the harbour-master continued on board the tug; that, soon after the tug had taken the Venilla in tow, without any direction that he knew of, the tug towed the Venilla to the schooner Alice, which was also laden with coals, and lying at the entrance of the creek, and a little lower down towards the sea, and the tug, in order to lay hold of the schooner Alice, had to take a half-circuit; *that from the tug (the harbour-master being on board of her) was thrown a small line to [*501 the Alice, and thereby her tow-rope was hauled off to the tug; that thus the Venilla and the Alice were both towed by the tug, the Alice being hindermost; that the tug proceeded with the two vessels, the Venilla being about five or six fathoms from the tug, and the Alice about five or six fathoms astern of the Venilla, each vessel being towed by a separate rope made fast to the tug; that he (the witness) did not acquiesce in the tug taking the Alice in tow; that, when they arrived at the bend of the creek, the Venilla took the ground upon a flat there, the tide flowing at the time, with the wind easterly upon the starboard quarter; that, upon taking the ground, the Alice, being close astern of the Venilla, immediately came upon her and struck her in the stern, which did the damage complained of; that witness afterwards saw the master of the Alice, who said he could say nothing about the collision until he had seen his owners.

On his cross-examination, the witness admitted that he had known the creek for fourteen or fifteen years, and the bend had always been considered to be a dangerous part of it; that he saw the buoy referred to after the accident, and after he had been told of it by the master of the tug, but not until his vessel was aground. In answer to the question,—"Will you swear that you were not told, before the vessel had run aground, to get out a rope to the buoy to ease her round?" witness said "I cannot swear that I was; I have heard that the buoy was placed there to ease vessels, but a rope cannot be put to it." The witness also said that he could not spare his men to go in a boat to make a rope fast, although he had eight men on board; that, after the Venilla had grounded, the Alice was at high-water towed past the Venilla, but he could not say whether *or not the Alice touched [*502 the ground in so doing; but there was not much room for her to pass.

On re-examination, this witness stated that he had never used the

buoy, and never knew a captain who had, and he never saw any directions to mariners to use it; that the Venilla drew about 10 feet 9 inches water, and the Alice rather less; and that he had no conversation with the harbour-master, who was in the tug, after the Venilla was laid hold of.

John Anderson, one of the plaintiffs, stated that two days after the grounding of the Venilla, Richard Blaxland, one of the defendants, called upon him and inquired what damage had been done; that he replied 25*l.*; that Blaxland ridiculed the idea of asking so high an amount, and offered to give 6*l.* to settle the matter.

On cross-examination, this witness stated that he would not swear that at the above-mentioned interview Blaxland did not deny his liability; but he (Blaxland) did say that he thought his vessel ought not to have been put behind another. He also said that John Cresswell, his co-plaintiff, was present at the above-mentioned interview.

John Cresswell was not called as a witness, although present at the trial.

It was admitted on the part of the defendants that they were the owners of the Alice. This, with the exception of the evidence of a shipwright to prove the damage done,—which for the purposes of this appeal may be taken at the amount for which judgment was given,—was all the evidence offered by the plaintiffs in support of their case.

Thereupon the attorney on behalf of the defendants contended before the judge that the plaintiffs ought to be nonsuited, upon the following, among other grounds, namely,—first, that there was no *503] evidence of negligence *or misconduct on the part of the defendants or their servants, and that consequently the plaintiffs ought to have been nonsuited,—secondly, that the act which caused the damage complained of was proved on the trial to be the sole act of the steam-tug which was towing the vessels of the plaintiffs and of the defendants, and that the remedy (if any) was against the parties in charge of the tug, and not against the defendants,—thirdly, that the defendants were not proved to have employed the tug in any way, and were not responsible for damage caused by her,—fourthly, that, admitting the tug was in the common employ of the plaintiffs and defendants, the defendants were not on the above facts by law liable to the plaintiffs for an act of negligence committed by the tug while in such common employ,—fifthly, that there was no evidence of the commission of any act of negligence or misconduct by any person, but the damage resulted from pure accident,—sixthly, that the occurrence happened because and while the defendants' vessel was obeying the directions of the harbour-master within the limits of his jurisdiction, and that the defendants were not liable,—seventhly, that the tug was the agent of the Venilla, and in her employ, and consequently the defendants could not by law maritime be liable for the act of the tug, but that the damage must remain where it fell.

The learned judge, however, refused to nonsuit, holding that, on the above facts, the defendants were liable; and a verdict was given for the plaintiffs for the amount claimed.

The question for the opinion of the court is,—whether the above facts disclose any liability whatever against the defendants in the said action, or whether the judge ought not to have nonsuited the plaintiffs.

Should the court decide that the plaintiffs ought to *have been nonsuited, then a nonsuit was to be entered accordingly, with costs, including the costs of this appeal: (a) but, if the court should think that the defendants were liable, then the verdict was to stand, and the appeal be dismissed with costs. [*504

Philbrick, for the appellants, was stopped by the court.

Prentice, for the respondents.—The only question is whether there was *any* evidence which could be left to a jury of negligence on the part of the defendants, not whether the evidence warranted the finding; for, that is not the subject of an appeal. It is submitted that the bare fact of the defendants' schooner being with their permission towed astern of the plaintiffs' brig, was strong evidence of negligence. The defendants are not the less liable because the owner of the tug may be liable also.

ERLE, C. J.—The learned judge of the county court has left it to us to say whether the facts stated in the case disclose any liability whatever against the defendants. I am of opinion that they do not disclose any liability whatever. The facts are in substance these:—The plaintiffs' brig was being towed by a steam-tug into Faversham Creek. The person in charge of the tug took another vessel in tow astern of the plaintiffs' vessel. In going in, the plaintiffs' vessel by some means went aground; and the defendants' vessel, which was five or six fathoms behind the plaintiffs' vessel, struck against and injured her. I cannot say that this was the result of negligence on *the part of the defendants, unless they omitted to do something which they might and ought to have done to avoid the collision. I know of nothing they could have done: and the learned judge of the county court suggests nothing. The appeal, therefore, must be allowed. [*505

WILLIAMS, J.—I am entirely of the same opinion.

WILLES, J.—I am of the same opinion. If it was negligence to tow a second vessel astern of the first, there is no statement in the case that the master of the plaintiffs' vessel made any objection to its being done.

BYLES, J., concurred. Judgment reversed, with costs.

(a) These in this court follow the event: see Schroder, app., Ward, resp., 13 C. B. N. S. p. 410 (E. C. L. R. vol. 106).

TOBIN and Another, Suppliants, *v.* THE QUEEN. *June* 11.

It is competent to the Crown (without leave) to plead and demur to a petition of right under the 23 & 24 Vict. c. 34,—there being nothing in that statute to take away the prerogative right of the Crown to plead double.

And the whole of the allegations in the petition may be put in issue by a general traverse,—though, *semble* that the court might interfere to prevent the suppliant from being prejudiced by an embarrassing plea.

A PETITION of right pursuant to the statute 23 and 24 Vict. c. 34, at the suit of Thomas Tobin and James Aspinall Tobin, was delivered to the solicitor to the Treasury on the 24th of February last, in the following form:—

"In the Common Pleas.

"Victoria Reg.
"Let right be done.

"To the Queen's Most Excellent Majesty.

"Middlesex, to wit. The Humble Petition of Thomas Tobin, of Liverpool in the county of Lancaster, and James Aspinall Tobin, of Eastham House, Eastham, in the county of Chester, by Thomas James Rooke, their attorney, of, &c.,

"Showeth

"That your suppliants are shipowners and merchants carrying on business in Liverpool, in the county of Lancaster, under the style or firm of Thomas Tobin & Son:

"That your suppliants, as such shipowners and merchants, have for twenty-eight years last past been very largely engaged in the African trade, and for the purposes of such trade, have established on the coast of Africa, between the 4th and 9th degrees of South latitude, storehouses and factories where your suppliants' vessels have been used and accustomed to discharge their outward cargoes for the purpose of such cargoes being bartered with the natives on that coast for African produce, and where your suppliants have been used and accustomed to receive in return for such cargoes palm-oil, ivory, gum, coffee, and other African produce, which they have been used and accustomed to ship on board their own vessels and bring direct to Liverpool:

"That, for the purpose of superintending and managing their trade and business on the said coast, your suppliants have for about five years last past employed on the said coast as their head resident agent there a highly respectable and trustworthy gentleman of the name of Maunsel Mecham, well qualified to conduct and manage their trade on the said coast, and several other responsible officers and servants under the said Maunsel Mecham; and, as your suppliants are informed and believe, all the officers and servants *employed under the said Maunsel Mecham are highly respectable and trustworthy persons, and well qualified to conduct and manage the said trade under the said Maunsel Mecham:

*507]

"That, in the year 1860, your suppliants through the said Maunsel Mecham purchased at Loando St. Paul's, on the said coast, a small vessel or packet-boat, then called The Mary and Isabel, but since called The Britannia, for the purpose of carrying their goods and merchandise to and from their said factories and storehouses on the said coast:

"That the said vessel, which at the time of the said purchase was not registered as a British ship, was purchased by your suppliants as aforesaid for the purpose of the same remaining and being used entirely on the said coast in their said trade there, and the same was never intended by your suppliants to be brought, and in fact never was brought by them after they so purchased it as aforesaid to any British port or place where it could be registered as a British ship; and, as your suppliants never considered that it was necessary (as they are advised and believe that it was not) that the said vessel should for the purpose of its being used by them in their said trade

as aforesaid be registered as a British ship, it never was so registered, and consequently, at the time of its being seized and destroyed as hereinafter mentioned, it was not registered, and had no right to a national flag:

"That the said vessel remained the property of your suppliants from the time of its being so purchased by them till it was so seized and destroyed as aforesaid, and during all that time was used and employed solely in their said trade, and was not in any way engaged in the slave-trade:

"That, in the month of August, 1862, the said vessel required repairs, and, being at that time at *a place called Landana, on the said coast, where the said repairs could not be done, she [*508 was by the directions and orders of the said Maunsel Mecham taken by and under the charge of William Mabbs, a seaman in the employ of your suppliants on the said coast, to a place on the same coast called Cabenda, for the purpose of having the said repairs done at the said last-mentioned place by Senor D. Francisco Franque:

"That the said vessel, when so taken to Cabenda aforesaid for the purpose of having the said repairs done to her as aforesaid, had on board six barrels of palm-oil as ballast, and seventy planks to be used in the said repairs:

"That the said planks,—which were thick red African planks, well adapted for repairing such a vessel as the Britannia, and not easily procurable, and which were not spare plank fitted for being laid down as a second or slave-deck within the meaning of the statutes for the suppression of the slave-trade,—were sent by the said Maunsel Mecham on board the said vessel from Landana aforesaid to Cabenda aforesaid for the sole purpose of being used by the said Senor D. Francisco Franque in the said repairs:

"That the said vessel arrived at Cabenda as aforesaid for the purpose of being so repaired as aforesaid on or about the 30th of the said month of August; and, in consequence of there being then no caulkers to be procured to work on the said vessel at the said last-mentioned place, she was on her arrival there as aforesaid dismantled and left at proper moorings there until the said repairs could be proceeded with, and at the same moorings she remained so dismantled as aforesaid, and having on board the said barrels of palm-oil as ballast, and the said planks to be used for the said repairs as aforesaid, from that time until on or about the 20th day of September, 1862, when she *was seized as a vessel engaged in the slave-trade, by and under the orders of Captain Sholto Douglas, then being com- [*509 mander of Your Majesty's ship Espoir, and employed under the authority of Your Majesty for the suppression of the slave-trade, according to the statutes in such case made and provided; and, on the alleged ground that the said ship was not fit for a voyage to St. Helena, being the place within Your Majesty's dominions to which she ought to have been taken for the purpose of being brought to adjudication in the Vice-Admiralty court there touching the said seizure as aforesaid, she was afterwards, on the said last-mentioned day, with the said barrels of palm-oil, the said planks, and other goods and property of your suppliants then being on board thereof, burnt and destroyed by the said Captain Sholto Douglas, so being such

commander and so employed under the authority of Your Majesty as aforesaid, and in the supposed exercise of his duties under such last-mentioned authority:

"That the said vessel was not at the time of her being so seized and destroyed as aforesaid, in any way engaged in the slave-trade or liable to be condemned as so engaged:

"That the value of the said vessel, palm-oil, planks, and other goods and property of your suppliants so burnt and destroyed as aforesaid amounted at the time of their being so burnt and destroyed to at least the sum of 1000*l.*; and that, by reason of the premises, your suppliants have not only lost their said vessel, palm-oil, planks, and other goods and property as aforesaid, but have abandoned their said African trade, and been greatly injured in their credit and reputation, and in their trade and business, and have thereby sustained damages to the amount of 10,000*l*:

*510] "Your suppliants, therefore, humbly pray *that Your Majesty will be pleased to do what is right and just in the premises, and cause your suppliants to be reimbursed and compensated for the losses, damages, and injuries so sustained by them as aforesaid.

"Dated the 3d day of February, 1863.

"W. Bovill,
"H. M. Cairns,
"James Kemplay. } Counsel for the said Thomas Tobin and James Aspinall Tobin."

Endorsed on this petition was a prayer for a plea on behalf of Her Majesty within twenty-eight days, otherwise that the petition might be taken as confessed. No plea was put in on behalf of Her Majesty within the twenty-eight-days: but, on the 24th of March, the solicitor to the Admiralty applied by summons for and obtained an order for fourteen days' time to plead and demur; and, after several further orders, a plea and demurrer were delivered on the 11th of May, as follows:—

"In the Common Pleas.

"The eleventh day of May, in the year of our Lord one thousand eight hundred and sixty-three.

"In the Matter of the Petition of Right of Thomas Tobin and another.

"Plea. And Sir William Atherton, Knight, the Attorney-General for our Lady the Queen, on behalf of Her Majesty, informs the court here that the several averments and statements contained in the said petition of right are not nor is any of them true in fact.

"Demurrer. And the said Attorney-General informs the court here that the said petition of right is bad in substance."

In the margin of the demurrer was the following note,—"The peti-
*511] tion of right does not show that the *Crown is in law responsible for any of the alleged unlawful acts of Commander Sholto Douglas."

No summons or order having been obtained either from the court or a judge giving leave to plead *and* demur, a summons was taken out by the petitioners on the 20th of May, calling upon the solicitor to the Admiralty to show cause "why an order should not be made that the petition of right might be taken as confessed, there having

been a failure on behalf of Her Majesty to plead or demur thereto in due time according to the practice and course of procedure in such case applicable; or why, if a plea and demurrer were to be deemed to have been duly delivered, the plea should not be struck out or amended, the same being so framed as to prejudice and embarrass the fair trial of the petition." Upon this summons coming before Keating, J., at Chambers, on the 22d of May, that learned judge, the point being a new one, referred the parties to the court.

Kemplay, accordingly, on a former day in this term, obtained a rule calling upon Her Majesty's Attorney-General, upon notice of the rule to be given to the solicitor to the Admiralty, to show cause why the plea to the petition of right of the suppliants delivered on behalf of Her Majesty should not be struck out or amended, the same being so framed as to prejudice the fair trial of the said petition. He submitted that the intention of the statute was to place these petitions upon the same footing as respects procedure as any ordinary suit, and consequently that it was not competent to the Crown to plead and demur without leave; and that the general traverse tended materially to embarrass the suppliants, inasmuch as it put them to proof of every one of the material averments in their petition.

*ERLE, C. J.—We are all clearly of opinion that no leave to plead and demur was necessary. The prerogative right of the Crown to plead double is not in any way altered by the 23 & 24 Vict. c. 34. The rule may go upon the second point. [*512

The Attorney-General, *Collier*, Q. C., and *West*, now showed cause.—This application is based upon the 52d section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, which provides, that, "if any pleading be so framed as to prejudice, embarrass, or delay the fair trial of the action, the opposite party may apply to the court or a judge to strike out or amend such pleading, and the court or any judge shall make such order respecting the same, and also respecting the costs of the application, as such court or judge shall see fit." Having regard to the peculiar nature of this proceeding, it is submitted that the plea is a perfectly right plea, and that the 52d section is wholly inapplicable to it. That which distinguishes this from an ordinary proceeding, is, that, although wrongful acts are charged, they are not imputed to the sovereign who is called upon to answer. If this had been a proceeding against Captain Sholto Douglas, he would have known how far the narrative contained in the petition was founded in fact, and what he might admit and what he was bound to traverse. The Queen's advisers, however, have no such knowledge: they, therefore, can only put the suppliants to proof of all the facts essential to entitle them to relief; and there is no hardship in this being done by one general traverse instead of a separate traverse of every allegation. Captain Douglas, if he had been sued, would have pleaded the general issue by statute, relying on the Slave-Trade Acts. The general form is always used in the Court of Chancery and on the equity side of the *Exchequer: see Van Heythusson's Equity Draftsman, Vol. 2, p. 11; 1 Fowler's Exchequer Practice, 400: and in The Baron de Bode's Case, 8 Q. B. 208, 239 (E. C. L. R. vol. 55), there was a plea to a petition of right, amongst others, in the very form here used. And there is no reason why the same [*513

general form should not be adopted now; for, the 23 & 24 Vict. c. 34 clearly does not contemplate that any change in this respect should take place. The 7th section, which enacts, that, "so far as the same may be applicable, and except in so far as may be inconsistent with this act, the laws and statutes in force as to pleading, evidence, hearing and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error, in suits in equity and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right," &c., does not, it is submitted, apply to the Attorney-General. The ordinary rules of pleading are altogether inapplicable. And if they were applicable, there is no pretence for saying that the suppliants could be at all prejudiced by this general traverse. It informs them that they must be prepared at the trial to substantiate all the material allegations in their petition, or so much at least as may entitle them to succeed. The 15th section empowers the judges to make rules and orders for regulating the pleading and practice on petitions of right; but none have been made. There is nothing in the act to alter or disturb the course formerly adopted, or to compel the Crown to put the allegations of the *514] *petition in issue in any other than the accustomed form.(a)

Bovill, Q. C., and *Kemplay*, in support of the rule.—The whole scope and object of this act was to deal with and to limit the prerogative of the Crown,—to give to the subject legal rights against the Crown which he did not before possess,—to put the petition of right in as nearly as possible the same position as a proceeding between subject and subject. The statute recites that "it is expedient to amend the law relating to petitions of right, to simplify the procedure therein, to make provision for the recovery of costs in such cases, and to assimilate the proceedings, as nearly as may be, to the course of practice and procedure now in force in actions and suits between subject and subject." The 1st section enacts that, "a petition of right may, if the suppliant think fit, be intituled in any one of the superior courts of common law or equity at Westminster in which the subject-matter of such petition or any material part thereof would have been cognisable if the same had been a matter in dispute between subject and subject, and, if intituled in a court of common law, shall state in the margin the venue for the trial of such petition." It then prescribes the form of the petition. The 2d section enacts that the petition "shall be left with the secretary of state for the Home department, in order that the same may be submitted to Her Majesty for Her Majesty's gracious consideration, and in order that Her Majesty, if she shall think fit, may grant her fiat that right be done," &c. The 3d section enacts, that, *upon Her Majesty's fiat being obtained to such petition, *515] a copy of such petition and fiat shall be left at the office of the solicitor to the Treasury, with an endorsement thereon in the form or

(a) See The Queen v. The Saddlers' Company, 22 Law J., Q. B. 451, which leaves it doubtful whether the 52d section of the Common Law Procedure Act, 1852, applies to proceedings upon a prerogative writ of mandamus.

to the effect in the schedule No. 2 to the act annexed, praying for a plea or answer on behalf of Her Majesty within twenty-eight days; and it shall thereupon be the duty of the said solicitor to transmit such petition to the particular department to which the subject-matter of such petition may relate; and the same shall be prosecuted in the court in which the same shall be intituled, or in such other court as the Lord Chancellor may direct." The 4th section enacts that "the time for answering, pleading, or demurring to such petition on behalf of Her Majesty shall be the said period of twenty-eight days after the same, with such prayer of a plea or answer as aforesaid, shall have been left at the office of the solicitor to the Treasury, or such further time as shall be allowed by the court or a judge: provided always that it shall be lawful for the Lord Chancellor, on the application of the Attorney-General or of the suppliant, to change the court in which such petition shall be prosecuted, or the venue for the trial of the same." The 5th section provides for the time of answering, pleading, or demurring by private persons having an interest in the subject-matter. The 6th section enacts that "such petition may be answered by way of answer, plea, or demurrer in a court of equity, or in a court of law by way of plea or demurrer, or by both plea and demurrer, by or in the name of Her Majesty, and by or on behalf of any other person who may in pursuance hereof be called upon to plead or answer thereto, in the same manner as if such petition in a court of equity were a bill filed therein, or, if the petition be prosecuted in a court of common law, as if the same were a declaration in a personal action, and *without the necessity for any inquisition finding the truth of such petition or the right of the suppliant; and such and the same matter as would be sufficient ground of answer or defence in point of law or fact to such petition on the behalf of Her Majesty may be alleged on behalf of any such other person as aforesaid [s. 5] called on to plead or answer thereto." The 7th section enacts, that, "so far as the same may be applicable, and except in so far as may be inconsistent with this act, the laws and statutes in force as to pleading, evidence, hearing and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, set-off, appeal, and proceedings in error in suits in equity and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right: provided always that nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this act." The 8th section enacts, that, "in case of failure on behalf of Her Majesty, or of any such other person as aforesaid [s. 5] called upon to answer or plead to such petition, to plead, answer, or demur in due time, either to such petition or any subsequent stage of the proceedings thereon, the suppliant shall be at liberty to apply to the court or a judge for an order that the petition may be taken as confessed; and it shall be lawful for such court or judge, on being satisfied that there has been such failure to

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plead, answer, or demur in due time, to order that such petition may be taken as confessed as against Her Majesty or such
*517] *other party so making default; and, in case of default on the behalf of Her Majesty and any other such person (if any) called upon as aforesaid to answer or plead thereto, a decree may be made by the court, or leave may be given by the court, on the application of the suppliant, to sign judgment in favour of the suppliant: provided always that such decree or judgment may afterwards be set aside by such court or judge, in their or his discretion, on such terms as to them or him shall seem fit." The 9th and 10th sections relate to the form of the judgment; and the 11th and 12th sections to the mode of enforcing costs by or against the Crown or any other person appearing or pleading or answering to the petition. The obvious intention of the statute was, to give as nearly as may be the same remedies against the Crown as against a subject; and for this purpose all the rules as to pleading and practice in ordinary cases are made applicable to the new proceeding. Though called a petition of right, it is neither more nor less in substance than an action or suit against the Crown; and, until the judges under the power conferred upon them by s. 15 make rules, the proceeding is to be governed by the existing rules of pleading and practice. Would a plea like this be permitted in an ordinary action? Assuming the facts upon which the claim of the suppliants is founded to have arisen partly here and partly abroad, this general form of traverse will materially affect their right to the costs of proof. Why, for instance, should they be put to the expense of proving that Captain Douglas was commander of the Espoir, or that he was employed on the duty alleged? It would be frittering away the valuable privileges conferred by this act, to hold that the petition is not to be dealt with in all material respects as if it were a declaration in an ordinary
*518] action. Are the suppliants to prove every averment in their *petition, whether material or not? [ERLE, C. J.—The whole constitutes one cause of action, which the suppliants are bound affirmatively to make out. WILLIAMS, J.—Have you a right to throw upon the Crown the burthen of selecting what averments are material and what are not, and putting the former only in issue?] It is submitted that we are. The way in which the prerogative of the Crown is affected by acts of parliament, is well illustrated by two cases in Bacon's Abridgment, *Prerogative* (E) 5. "By an act of parliament, 22 Car. 2, c. 11, the parishes of St. Michael, Wood Street, and St. Mary, Staining, in London, were united and established as one parish church; and it was provided that the first presentation should be made by the patron of such of the said churches the endowments whereof were of the greatest value. The King was patron of St. Mary, Staining (of far less value), and a common person patron of St. Michael, Wood Street, who presented Mr. Crooke. On a caveat entered against the institution, it was determined by civilians, by the advice of lawyers at Doctors Commons, that this statute, though in the affirmative, and without any negative words, extended to and so far bound the King as to deprive him of any preference he might have by his prerogative, as in cases where his interest is intermixed with others; and that the act of parliament giving a new estate to the King, and prescribing the manner of enjoyment, the method limited must take place of the

King's prerogative." Again, "by a private act of parliament, 1 James 2, the parish of St. James was taken out of the parish of St. Martin, and made an independent parish; and it was provided by the statute that Dr. Tenison, the then Vicar of St. Martin's, should be the first rector of St. James's parish, and that the patronage of the advowson should belong to the Bishop of London and Lord *Jermin alternis vicibus,—the first rector after vacation by Dr. Tenison [*519 to be presented by the Bishop of London, and the next by the Lord Jermin and his heirs, and so on. Dr. Tenison was promoted to the bishopric of Lincoln, by which the church of St. James became void: and it was adjudged, that, although it was by the statute expressly appointed that the Bishop of London should present upon the avoidance, yet the statute designed only to direct the methods and turns between the patrons, and not to exclude the King of his prerogative; and, although this was a church newly erected, yet the King having the prerogative to present to all churches where the incumbent is promoted, shall have it in this church when it is erected."

ERLE, C. J.—I am of opinion that this rule should be discharged. The suppliants have brought into this court their petition of right, and that petition describes that which would perhaps constitute a good cause of action if alleged against a subject, viz. that their vessel was seized and destroyed without justifiable cause. I may here observe, that, if this had been a declaration for a trespass, the cause of action would have been expressed in technical language; whereas, this petition of right, instead of describing the claim in a concise manner, uses the most vague and general terms; and no doubt it is purposely so framed. The Attorney-General, on behalf of the Crown, besides demurring on the ground that the petition of right is bad in substance, as disclosing no liability in the Crown for the alleged unlawful acts of Commander Douglas, has pleaded that the several averments and statements contained in the petition of right are not nor is any of them true in fact. The suppliants, therefore, to establish their claim, would *have upon that traverse to prove so many of the material [*520 statements in their petition as would show their right if this were a contest between subject and subject. The immaterial averments may always be disregarded. The Attorney-General, on behalf of the Crown, claims a right to make a general and comprehensive denial of the suppliants' right to redress, and to call upon them to establish by affirmative evidence that Her Majesty's officer did wrong. That which they are thus called upon to prove is one single proposition involving several steps. They must prove that their vessel was engaged in lawful trade, and not connected with the unlawful traffic in slaves. If they prove that, and that she was wrongfully destroyed by Captain Douglas, it may be that they will have proved enough to call upon the Crown for an answer. It is said that this general traverse is calculated to embarrass the suppliants on the trial, and that the Crown should have taken a separate issue on each material allegation in the petition of right. I am of opinion, that, if that proposition could be sustained, the trial would be very much embarrassed. Upon the general denial, the jury would have to decide whether the suppliants had proved the material facts without which they would not be entitled to any redress. The whole would go as one question to them,

and that question would be tried in a convenient and practical manner. But, if there were to be separate issues on each of the material allegations in the petition, there would be so many questions to put to the jury that much embarrassment would ensue. It is urged that the suppliants are placed at great disadvantage as regards costs if they are by this form of pleading compelled to prove every statement in their petition. But I think the Crown has full right to plead in this general form. I see great inconvenience that might result from the *521] Crown *being required to put in issue particular parts of the statement and admit the rest: but I see no great harm in leaving the suppliants to the consequences of a failure to establish any part of their complaint. It is said that the 7th section of the 23 & 24 Vict. c. 34 is conclusive, and that the legislature has thereby taken away to a certain extent the prerogative of the Crown, by subjecting the petition of right to all the ordinary rules of pleading. But I do not think that conclusion is warranted by the language which the legislature has used. The 2d and 3d sections, upon which we recently had so much discussion in this court in the case of O'Malley Irwin *v.* Sir George Grey, show that the prerogative of the Crown is retained. The 6th section, upon which some reliance has been placed, does not relate to the form of pleading, but merely takes away the inquisition on the petition of right. The 7th section, which relates to the mode of procedure, says that "*so far as the same may be applicable*, and *except in so far as may be inconsistent with this act*, the laws and statutes in force as to pleading, &c., in suits in equity and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right." I agree, that, if this had been an action against Captain Douglas, this general form of traverse would have been bad: but, looking at the nature of this petition, and at the vague statements contained in it, I am of opinion that the rules of procedure which govern the proceedings between subject and subject are wholly inapplicable, and that *522] the Crown has a right to deny in general terms the truth *of the whole of the statement which the suppliants rely on as constituting their claim of right.

WILLIAMS, J.—I am of the same opinion. The plea here pleaded by the Crown amounts to what in former times was called the general issue, which put the plaintiff to proof of all the material averments necessary to support his claim. I know of no rule of law, and there is nothing in the recent statute, which prevents the Crown from doing this. It is said that the court may, in the exercise of its discretion under the 52d section of the Common Law Procedure Act, 1852, prevent the Crown from availing itself of this right because its exercise tends to embarrass the fair trial of the petition. Undoubtedly, the courts have on many occasions thought themselves warranted in compelling the amendment of pleadings which they have considered to be calculated to embarrass the opposite party in the conduct of the action or defence generally: and, if it had appeared to the court in this case that the suppliants were likely to be prejudiced or embar-

rassed by the generality of the traverse, I am far from saying that we should not have had power to interpose. But I think that is by no means made out. And I think it would be oppressive towards the Crown if it were obliged to pick out from this petition such of the allegations contained therein as are material, and specifically traverse them.

WILLES, J.—I am of the same opinion. I apprehend that when this question is closely looked at, it will be found that it was disposed of in the refusal of the rule on the ground that the prerogative of the Crown remains unaffected by the statute. At common law it is clear that the Crown was not precluded from pleading double, or pleading and demurring. I speak with *the sanction of the highest authority when I say that the right of the Crown to plead double was unaffected by any of the statutes or rules of court relating to pleading and procedure. And this applied not only to the proceedings on a petition of right, but also to the monstrans de droit and traverse of office. In Manning's Exchequer Practice, App. D., p. 225, will be found an instance of the Attorney-General, in a replication on behalf of the Crown, taking issue on a variety of matters alleged in the plea. It is true that each allegation was introduced by the words "for further replication," &c.; still this is an exceedingly strong authority to show the exercise of the prerogative right. That being so, then came Mr. Bovill's act, to amend the law relating to petitions of right, to simplify the proceedings, and to make provisions for costs. The 6th section enacts that such petition of right "may be answered by way of answer, plea, or demurrer in a court of equity, or in a court of common law by way of plea or demurrer, or by both pleas and demurrer, by or in the name of Her Majesty's Attorney-General on behalf of Her Majesty, and by or on behalf of any other person who may in pursuance hereof be called upon to plead or answer thereto, in the same manner as if such petition in a court of equity were a bill filed therein, or, if the petition be prosecuted in a court of law, as if the same were a declaration in a personal action, and without the necessity for any inquisition finding the truth of such petition or the right of the suppliant." This is in terms an enabling clause. Then comes the 7th section, upon which so much reliance has been placed,—"So far as the same may be applicable, and except in so far as may be inconsistent with this act, the laws and statutes in force as to pleading, evidence, hearing and trial, security for costs, amendment, arbitration, special cases, the means of procuring and taking evidence, *set-off, appeal, and proceedings in error in suits in equity and personal actions between subject and subject, and the practice and course of procedure of the said courts of law and equity respectively for the time being in reference to such suits and personal actions, shall, unless the court in which the petition is prosecuted shall otherwise order, be applicable and apply and extend to such petition of right." Now, the law with respect to double pleading has no reference to pleading by or on behalf of the Crown. Under this statute, a subject who is made party to a petition of right may plead and demur thereto by leave of the court: but it is unnecessary for the Attorney-General to resort to the statute to enable him to do what the law enabled him to do before. I cannot help thinking, that, if Mr. Bovill had been

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addressing himself to us in his capacity of legislator, he would not have urged the arguments we have heard to-day. I can see no benefit that could arise from giving the sanction of the court to the course of pleading which the Attorney-General on behalf of the Crown may deem advisable: but I can see something very unseemly in a contest before the court as to his right to adopt it. Much larger powers than this are confided to Her Majesty's Attorney-General: and the probability of an abuse of the discretion conferred upon him is so very remote, that no practical inconvenience can result from its exercise. We are called upon to interfere in this case because the form of traverse is calculated to embarrass the trial. I am unable to see how it can do so. This is not the case of an ordinary pleading. The petition consists for the most part of evidence. It is true that such a general traverse as this could not be pleaded to an ordinary declaration: but that is because a subject cannot plead more than one traverse without the leave of the court. I would add, in conclusion, that, if any *525] *case should arise in which a plea of this description, even by the Attorney-General, was shown to embarrass the suppliant in his proceeding, the court I apprehend would have ample power to interfere to prevent injustice being done.

BYLES, J.—I am of the same opinion. The petition in this case consists of a long rambling statement containing some allegations that are material and very many that are wholly immaterial. Who is to separate the one from the other? Clearly it is for the suppliants, and not for the advisers of the Crown, to consider what is material and requisite to prove, and what not. If we were to hold that the general traverse is bad, there is nothing to prevent the Attorney-General from traversing every single allegation in the petition: and thus the record would be infinitely more embarrassed than it could be by being left in its present state. I cannot help thinking that the suppliants are under great obligation to the court for arresting their footsteps in due time.

ERLE, C. J.—The costs of this rule will be costs in the cause for the Crown. Rule discharged.

*526] *EDWARDS and Others v. THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY.

June 11.

The court will not grant a rule (under the 8 & 9 Vict. c. 16, s. 36) for a scire facias against a party as a shareholder in a joint-stock company, upon a judgment obtained against the company, unless the affidavits disclose reasonable grounds for believing that the party sought to be charged is a shareholder. The fact of his having applied for and received an allotment of shares, and paid a deposit thereon, is not enough.

C. COLERIDGE, on a former day in this term, on behalf of the plaintiffs, who had obtained a judgment against the company, obtained a rule calling upon one Henry Trewolla to show cause why a writ or writs of scire facias should not be issued forth against him as a shareholder of the company, to enable the plaintiffs to have execution upon the said judgment to satisfy the plaintiffs for the residue unpaid on such judgment, amounting to 1100*l.*, to the extent of the said Henry

Trewolla's shares in the capital of the said company not paid up, pursuant to the Companies Clauses Consolidation Act, 1845.(*a*)

The affidavits upon which the rule was obtained stated that the plaintiffs were employed by the *defendants as their solicitors, [*527
and as such the defendants became indebted to them for business done for them from the year 1847 to the year 1854; that such costs were duly taxed and allowed at the sum of 5484*l.* 2*s.* 5*d.*; that, on the 9th of December, 1854, an action was commenced by the plaintiffs in this court against the defendants, who were a company incorporated by act of parliament 9 & 10 Vict. c. ccclx., in which act the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16) is incorporated, and that final judgment was recovered in such action on the 18th of December following for 4413*l.* 15*s.* 10*d.* debt, and 3*l.* 8*s.* costs; that the defendants were justly and truly indebted to the plaintiffs in the sum of 4413*l.* 15*s.* 10*d.* for work done, &c., and in 3*l.* 8*s.* the costs of the said judgment, and that there was then remaining due to the plaintiffs and unpaid on the said judgment the sum of 1100*l.* or thereabouts; that, on the 29th of December, 1854, a writ of fi. fa. was issued in the action, directed to the sheriffs of London, commanding them to levy the amount recovered in the said action on the goods and chattels of the defendants, to which the sheriffs returned nulla bona; that there is not now nor has there been for some years past any acting secretary of the above-named company; that the company have not, nor ever had, any lands, chattels, property, or effects either in England or Ireland whereon the plaintiffs could or can levy the amount of the judgment in this action, or any part thereof; that the deponent had inspected the books of the company and the sealed registers of shareholders therein, and from the information thus obtained and otherwise he alleged that Henry Trewolla is a shareholder of the above-named company, and that his name is on the sealed registers of shareholders in the said company for the years 1853 to 1854, both inclusive, as the holder of *five shares of the value of 20*l.* each, upon which the [*528
sum of 2*l.* 10*s.* per share has been paid.

Kingdon on a subsequent day showed cause, upon an affidavit in which Mr. Trewolla deposed that his wife was the daughter of Samuel Stokes who died at Liverpool in or about the month of January, 1850, insolvent; that no one ever administered to the effects of the said Samuel Stokes, but that, after his death, the deponent examined the papers in his possession at the time of his death, and amongst them found a packet containing scrip and share certificates in various companies, and amongst such certificates he found a paper which purported to bear date the 17th of September, 1846, and purported that Mr. Henry Trewolla had left with the secretary of The

(*a*) S. 36, which enacts, that, "if any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not paid up: Provided always that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order execution to issue accordingly; and, for the purpose of ascertaining the names of the shareholders, and the amount of the capital remaining to be paid up on their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee."

Kilkenny and Great Southern and Western Railway scrip-certificates for five shares to be exchanged for certificates under the seal of their railway; that the deponent never had or possessed any scrip-certificates for any shares in the said railway, nor had he ever left any scrip-certificate for shares with the secretary of the said railway to be exchanged for certificates under the seal of the said railway, nor did he ever apply for or obtain, or authorize the said Samuel Stokes or any other person to apply for or obtain any scrip or other certificates or shares or any interest whatever in the said railway, or in the above-named defendants' company, for him or in his name, nor, until he discovered the said paper-writing, did he ever know that any scrip-certificate for shares in the said railway had been applied for or obtained in his name; that he supposed the said Samuel Stokes must have applied for and obtained the said scrip-certificate in his name, but without his knowledge or consent, for the purpose of obtaining a
*529] larger allotment of shares than he could *otherwise have obtained; that the deponent was shortly afterwards seized with a severe illness; that some time in the latter part of the year 1850, the deponent was for the first time informed by his wife, that, in the month of October previously, she had opened a letter addressed to him by Messrs. Atkinson & Pilgrim, bearing date the 24th of October, 1850, and demanding payment of certain calls and interest on five shares alleged to be held by him in the above-named defendants' company, and being as he believed the shares referred to in the paper-writing before mentioned, and that, fearing that if legal proceedings were taken against him as threatened in the said letter, it might bring on a recurrence of his said illness, she had without his knowledge borrowed 5*l.*, the amount of the calls mentioned in the said letter, from his brother Richard Trewolla, and had procured her nephew Edward Jones to forward that sum to the solicitors whose names were subscribed to the said letter, in payment of the said calls, and that up to that time the deponent had no knowledge whatever of the said letter or of its contents or subject-matter; and that he had never held or possessed any shares or share or scrip-certificate for any shares or share, or any interest whatever in the company, or authorized any person to hold or possess any shares or share or any interest whatever in the said company for him or in his name, nor had he ever authorized any shares or share in the said company to be registered in his name.

The wife, and the nephew, Edward Jones, also made affidavits verifying their part in the transaction, as above alleged.

Coleridge, in support of his rule.—The fact of Trewolla's name
*530] being on the register of shareholders is *primâ facie evidence that he is a shareholder. In The Bank of England *v.* Johnson, 3 Exch. 598, where a member of a banking copartnership sold his shares before the date of the contract on which the company was sued, and his name had been omitted in the return made to the stamp-office (under 7 G. 4, c. 46), a wrong form having been adopted,—it was held that the question as to his being a shareholder at the time of the contract was still a matter to be tried on a sci. fa. [ERLE, C. J.—There the party was a shareholder: here, it was sworn that Trewolla is not entitled to a share.] That will be a question for the jury on the trial.

[ERLE, C. J.—The sci. fa. is to go against a shareholder. BYLES, J. —The court cannot order a sci. fa. to issue until some evidence is produced to show that the party against whom it is prayed is a shareholder.] The register is primâ facie evidence: 8 & 9 Vict. c. 16, s. 28. In Clowes *v.* Brettell, 11 M. & W. 461, by an act of parliament (4 & 5 Vict. c. lxxxix.), for creating a joint-stock company (The Patent Rolling and Compressing Iron Company), it was enacted (s. 20) that the company should cause to be enrolled in Chancery a memorial of the names, residences, and descriptions of the shareholders of the company. Another clause (s. 32) provided that the expenses of applying for and obtaining the act should be paid out of the funds of the company in preference to all other payments whatsoever. The memorial enrolled under the act contained the names of *John* Batty, carrier of Wolverhampton, and of William Ryton; and, on application for a sci. fa. to have execution under the act against *William* Batty and William Ryton, in an action for an expense incurred in obtaining the act, it was sworn, on the part of the plaintiffs, that William Batty was by mistake called and inserted in the memorial as *John* Batty: for the parties against whom the application *was made, it was sworn that there was no such person as *William* Batty who was a shareholder of the company, and also that Ryton was not a shareholder,—and yet it was held that these counter-allegations were no answer to the application for the scire facias; Parke, B., saying, "If the allegation that these parties are not really shareholders be true, they may plead it to the scire facias, and they will be safe." [WILLES, J.—There the application was made promptly. Here, the plaintiffs have allowed several years to elapse, whereby much greater difficulty is placed in the way of the parties called upon. Under such circumstances, it behoves us to be very cautious how we put them to the inconvenience of such a proceeding as this. ERLE, C. J.—I see no evidence that Trewolla is a shareholder. In The Waterford, Wexford, and Dublin Railway *v.* Pidcock, 8 Exch. 379, the defendant by letter requested the provisional committee to allot him one hundred shares in a proposed railway company. In answer he received the following letter,—"Sir, The provisional committee having allotted to you fifty shares of 20*l.* each in this undertaking, I am instructed to request that you will pay a deposit upon them of 1*l.* 10*s.* per share on or before the 30th instant to one of the following bankers," &c., &c. "I beg also to inform you that scrip-certificates for the above number of shares will be delivered to you in exchange for this letter and the banker's receipt for the deposit, after the execution of the parliamentary contract and subscribers' agreement, which will lie for your signature at this office on and after Monday, the 30th instant." At the foot of the letter was the following memorandum,—"The shares allotted to you will be considered forfeited, if the deposit be not paid within the period specified above; and the parliamentary contract and subscribers' agreement must be signed on or before the 26th of *August, 1845." *The defendant paid the deposit, but did not sign the parliamentary contract or subscribers' agreement.* The company was afterwards incorporated, and the defendant's name was placed on the sealed register of shareholders. In an action for calls, it was held that the defendant was not a shareholder, and that the

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above circumstances were an answer to the primâ facie case arising (under the 8 & 9 Vict. c. 16, s. 28) from the production of the register containing the defendant's name.(a)] In The Newry and Enniskillin Railway Company v. Coombe, 3 Exch. 565, 574, Parke, B., says: "The words (in s. 8 of the 8 & 9 Vict. c. 16) 'every person who shall have subscribed,' mean 'every person who shall have contracted to subscribe.'" [WILLES, J.—Trewolla's affidavit shows that the shares in question were, without his sanction or knowledge, obtained by his father-in-law Stokes in his name. Does it appear that Trewolla signed the deed?] The affidavits do not show how the fact is. But that may be ascertained by an inspection of the deed.

ERLE, C. J.—We must have reasonable evidence that the party sought to be charged is really a shareholder before we allow the scire facias to go. If it be manifest upon the materials before us that the proceeding must result in a nonsuit or a verdict for the defendant, it *533] would be imposing great hardship and injustice on *the party to put him upon his defence. Let the case stand over until to-morrow; and in the meantime the deed may be referred to in order to ascertain whether Trewolla's name appears on it.

Coleridge now produced an affidavit of the managing clerk of the plaintiffs' attorneys, who deposed that he had caused all the papers relating to The Kilkenny and Great Southern and Western Railway Company to be searched that were to be found at the offices of the plaintiffs' attorneys, and amongst them had been found an application accompanied by a scrip-certificate of five shares of the respective numbers 5136, 5137, 5138, 5139, 5140, signed "Henry Trewolla;" that the deponent had also found an original exhibit used in the Court of Chancery in the case of Horne and Others v. The Kilkenny and Great Southern and Western Railway Company and Others, in which Henry Trewolla of Wiveliscombe, Somerset, plumber, appeared as the registered proprietor of five shares numbered 5136 to 5140; that he had also found a book containing as he believed the counterfoils of certificates, and at numbers 5136 to 5140 he found the name of "Henry Trewolla, Wiveliscombe, Somerset," and at numbers 5141 to 5145, he found the name of "Samuel Stokes, plumber, 4 St. James's Street, Bath;" that he believed that Henry Trewolla whose name appeared signed to the application for the shares as thereinbefore set out, and the said Henry Trewolla whose name appeared in the counterfoil above mentioned, to be the same Henry Trewolla who had made an affidavit in this matter, and he believed the said Samuel Stokes to be the person referred to therein; that, soon after the notice to apply for a writ of scire facias had been served upon the said Henry Trewolla, a clerk from one W. C. agent for the said Henry Trewolla, and pur- *534] porting to act on his *behalf, called at the offices of the plaintiffs' solicitors, and asked the deponent what was the lowest amount he was empowered to take in satisfaction of the plaintiffs'

(a) And see Moss v. The Steam Gondola Company, 17 C. B. 180 (E. C. L. R. vol. 84). It was there held, that, to entitle a creditor who has obtained judgment against a joint-stock company completely registered under the 7 & 8 Vict. c. 110, to an execution against one as a shareholder, under the 8 & 9 Vict. c. 16, s. 36, it must be shown that the party against whom the application is made comes within the statutory definition of a shareholder, viz., one who has signed the deed of settlement: it is not enough to show that he has acted as a director of the company.

claim against Mr. Trewolla, and whether he would take 40*l.* in such satisfaction, which the deponent at once declined to do; that the deponent had been informed and verily believed, that, in return for such scrip, certificates were sent to the address mentioned thereon; that he had compared the signature "Henry Trewolla" signed to the said request to be registered, with the signature "Henry Trewolla" signed to the affidavit made by the said Henry Trewolla herein, and he verily believed them both to be written by the same person; and that, upon reading the affidavit of the said Henry Trewolla, the deponent was taken by surprise, but he verily believed, that, if the rule were enlarged until next Michaelmas Term, he should be able to have the papers referring to this company, and which were very voluminous, carefully searched through, and he believed that the plaintiffs would thereby be enabled to obtain much valuable information in establishing their claim against the said Henry Trewolla, and should also be able to find the clerk who posted the said certificates to the said Henry Trewolla.

The learned counsel stated that the deed did not appear to have been signed by Trewolla: but he submitted, that, although he had not signed the deed, he had clearly contracted to sign it, and that, according to the dictum of Parke, B., in The Newry and Enniskillen Railway Company *v.* Coombe, was enough to constitute him a shareholder. [ERLE, C. J.—"Subscribed" there means paid a sum of money.] It is submitted that at all events enough is shown here to call upon the party to plead to the sci. fa.

*ERLE, C. J.—If upon the materials which are laid before us we are of opinion that the proceeding against the party sought [*535 to be charged must fail, we ought not to put him to the difficulty and anxiety of litigation. I see no reasonable ground for thinking Mr. Trewolla liable as a shareholder in this company. Mere payment of the deposit does not make a man a shareholder: he becomes a shareholder by signing the subscribers' agreement or deed of settlement of the company. The rule must be discharged with costs.

The rest of the court concurring, Rule discharged.

WILLIAM MARSH, by HENRY MARSH, his next Friend, *v.* LOADER. *May* 30.

An infant under the age of seven years cannot incur the guilt of felony.

The defendant caught a child in the act of stealing a piece of wood from his premises, and gave him into custody. The child was discharged by the magistrate on the ground that he was under the age of responsibility, and he afterwards by his next friend brought an action against the defendant for false imprisonment:—Held, that a plea of felony was no answer to the action: and, the jury having given him 20*l.* damages, the court declined to interfere on the ground of excess.

THIS was an action for a trespass and false imprisonment, brought by the plaintiff, an infant, by his father and next friend.

The defendant justified on the ground that the plaintiff was guilty of felony, whereupon he gave him into custody, and caused him to be carried before a magistrate. Issue thereon.

The cause was tried before Keating, J., at the first sitting at West-

minster in this term. It appeared that the plaintiff's father and the defendant were both builders living near each other; that the defend-
*536] ant had on several occasions missed pieces of wood from *his premises; and that, on one occasion, he saw the plaintiff carry away a piece and take it into his father's house, whereupon he gave him into custody and caused him to be taken before a magistrate, who discharged him.

On the part of the plaintiff, it was proved that he was at the time of the transaction in question a month or two under seven years of age, and therefore, it was submitted, incapable of committing a felony.

The learned judge ruled that the plea was no answer to the action: and the jury returned a verdict for the plaintiff with 20*l.* damages.

Powell now moved for a new trial, on the ground of misdirection, that the verdict was against evidence, and that the damages were excessive. He submitted, that, though a child under the age of seven years cannot be punished for a felony, there is no authority for saying that he may not lawfully be prosecuted. [ERLE, C. J.—An infant under seven years of age cannot incur the *guilt* of felony.] Take the case of a lunatic,—he commits an act which in a sane person would be felony; he is put upon his trial, and acquitted on the ground of insanity: but, who ever heard of the prosecutor being sued for giving him into custody? Here, the child was discharged on the ground of his tender years: by parity of reasoning, the party giving him into custody should not be held liable to an action. In Hawkins's Pleas of the Crown 1, it is said that "the guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it." "It is to be observed that those who are under a natural disability of distinguishing between good and evil, as, infants under the age of discretion [by the law of
*537] England *seven years], idiots, and lunatics, are not punishable by any criminal prosecution whatsoever." And in the note (1) it is said: "Legal guilt is a violation of positive law; a crime or misdemeanor may, therefore, be defined the 'wilful' commission or omission of any acts in violation of a public law either forbidding or commanding it. This definition comprehends both crimes and misdemeanors, which are synonymous terms, though in common usage the word 'crimes' is made to denote offences of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors:' Bl. Com. lib. 4, c. 1. But the act done or omitted, in order to be criminal, must be wilful. The consent of the will is that which renders human actions either commendable or culpable, and where there is no will to commit an offence there can be no transgression, saith Sir M. Hale (Hale P. C. c. 2). That learned judge then goes on to state those causes which the law of England notices as excusing the fact from incapacity or defect of will, which he classes as follows,—1. Natural; 2. Accidental; 3. Civil incapacities or defects. The natural is that of infancy. The accidental defects of will are,—1. Dementia; 2. Casualty or chance; 3. Ignorance. The civil defects or want of will,—1. Civil subjection; 2. Compulsion; 3. Necessity; 4. Fear." [ERLE, C. J.—That disposes of your plea.] Infancy should have been replied. At all events the

damages are excessive. [ERLE, C. J.—We cannot interfere on that ground.]

PER CURIAM.—The ruling of the learned judge was perfectly correct, and we see no ground for finding fault with the verdict.

Rule refused.

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*WOOLLEY *v.* POLE, Treasurer of the Company of London Insurers commonly called THE SUN FIRE OFFICE COMPANY. *June* 11. [*538

Upon an application for discovery, under the 50th section of the Common Law Procedure Act, 1854, the affidavits should identify the documents of which discovery is sought: a mere vague suggestion that some documents exist, will not suffice.

And, *quære* whether a defect in this respect can be aided by reliance upon the affidavits produced in answer to the motion?

In an action upon a fire-policy, the court made an order for the production of communications which passed between the company and their agent by whom the insurance was effected, and between the company and other offices who shared in the risk, relative to the existence and value of the property about to be insured.

But they refused to allow the plaintiff to inspect the reports and list of salvage made out for the company by their own officers.

THIS was an action brought by the plaintiff to recover the sum of 5000*l.* insured in the Sun Fire Office upon furniture and other effects in the plaintiff's late residence, Campden House, Kensington, which were destroyed by fire there on the 23d of March, 1862. One of the conditions endorsed on the policy,—the 10th,—was as follows:—

"Persons insured sustaining any loss or damage by fire are forthwith to give notice thereof at the office, and as soon as possible afterwards deliver in as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their solemn declaration according to the form practised in the said office, and by their books of accounts or such other proper vouchers as shall be reasonably required; until the production of which the loss money shall not be payable. And if there appear any fraud or false swearing, or that the fire shall have happened by the procurement or wilful act, means, or contrivance of the assured or claimants, he, she, or they shall be excluded from all benefit from their policies. And, in case any difference shall arise between the office and the insured touching any loss or damage, such difference shall be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive and binding on all parties. And in every case *of loss, the company reserves [*539 the right of reinstatement, in preference to the payment of claims, if it should judge the former course to be more expedient: but, when any loss is settled and adjusted, the insured will receive immediate payment for the same, without any deduction or discount."

The defendant pleaded,—first, that no account of the loss and damage was delivered in accordance with the tenth condition,—secondly, that no proof of the said loss and damage was made by the plaintiff in accordance with that condition,—thirdly, that the account delivered by the plaintiff was fraudulent, within the meaning of that

condition,—fourthly, that the fire happened by the procurement, wilful act, means, or connivance of the plaintiff,—fifthly, that the premises were not burnt or destroyed by fire, as alleged. Upon these pleas the plaintiff joined issue.

There was a second action against the defendant upon another policy for 10,000*l.* upon house-fittings and fixtures destroyed at the same fire. By a judge's order, made by consent, this action was to abide the event of the first action,—the damages in the second action, in the event of a verdict being found for the plaintiff in the first, to be assessed as upon a judgment by default.

There was a further policy for 5000*l.* effected in the Hand-in-Hand Insurance office on the house-fittings and fixtures: and also an insurance for 5000*l.* upon pictures and paintings on the same premises, in the Atlas Insurance office. Upon these also actions had been brought.

Upon affidavits setting forth the above facts, and further alleging that the whole of the above insurances were effected through the medium of Mr. Charles Freeth, jun., the authorized agent of the Sun Fire Office; that *communications in writing passed between the said Charles Freeth, jun., and the Sun Fire Office and the other offices, and between the Sun Fire Office and the other two insurance offices above mentioned with reference to the acceptance or otherwise of the insurances by them, the amounts of such insurances, and the distribution thereof between the said offices; that the plaintiff was advised and believed that the contents of such communications between the said Charles Freeth, jun., and the Sun Fire Office and the Hand-in-Hand and Atlas Insurance Offices, and between the said Sun Fire Office and the Hand-in-Hand and Atlas Insurance Offices, had a material bearing upon the issues joined in this cause, and that the production of such communications to his solicitor was material and necessary to his case; that, in the course of the communications between the plaintiff's solicitors and the Sun Fire Office with reference to the plaintiff's claim in this action and the other action against the Sun, sundry inventories, claims, declarations, letters, and documents had been sent on the plaintiff's behalf to the representatives of the Sun Fire Office, in substantiation of the plaintiff's claims upon the said office;* that the plaintiff was advised and believed that the production of the documents last referred to was material and necessary for his case; that, in addition to the above documents, the deponent believed that the defendant or his attorney had in his possession or control various other documents, and particularly reports of certain officers appointed by the insurance-company to go over the debris of the house after the happening of the fire, and of the articles of the salvage found in process of such examination, and also reports upon the salvage so recovered, by officers or others appointed to inspect the same, as also from the fireman who had been in charge of the premises since the fire; and that he believed that all the documents above referred to were in the possession or under the control of the above-named defendant or of his solicitor.

Bovill, Q. C., moved for a rule for a discovery under the 50th section of the Common Law Procedure Act. 1854, 17 & 18 Vict. c. 125. [WILLES, J.—In an action against the Atlas Insurance Office, I made an order as to the list of pictures handed in at the time of effecting

the insurance, but I refused it as to the rest.(a)] The plaintiff is desirous, in order to rebut the charge of fraud make against him by the pleas, of seeing the reports made by the company by their own officer at the time they accepted the insurance. It is submitted, that, under the Common Law Procedure Act, 1854, a party is entitled at least to such discovery as he might have obtained before by filing a bill of discovery. [ERLE, C. J.—You are entitled to a discovery of anything which goes to prove your case, and probably also to meet the case to be made by your adversary: but you are not to look into your adversary's brief.] All that the court is asked to do, is, to act upon the rule which guides the discretion of the Court of Chancery in these cases. This is well illustrated by the case of Flight *v.* Robinson, 8 Beavan 22. Flight was the purchaser of an estate which had belonged to Sir T. M. Champneys, an insolvent. Robinson and another were his assignees. Amongst other documents of which discovery was sought, were "letters and written communications from creditors under the insolvency of Sir T. M. Champneys, and letters and like *communications from the defendants' solicitors to such last-mentioned creditors, and private memoranda of the [*542 defendants' solicitors of proceedings at confidential meetings with such creditors, and cases for the opinion of counsel on behalf of such creditors, and the opinions of counsel thereon." And Lord Langdale, M. R., said (p. 33),—"According to the general rule which has always prevailed in this court, every defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, he is required and compelled, under the most solemn sanction, to set forth all he knows, believes, or thinks in relation to the matters in question. The plaintiff being subject to the like obligation, on the requisition of the defendant in a cross-bill, the greatest security which the nature of the case is supposed to admit of is afforded for the discovery of all relevant truth, and by means of such discovery this court, notwithstanding its imperfect mode of examining witnesses, has at all times proved to be of transcendant utility in the administration of justice." [BYLES, J.—In Thompson *v.* Robson, 2 Hurlst. & N. 412, the Court of Exchequer held that the documents the discovery of which is sought under s. 50, must be identified. It is not enough to speculate upon their existence. In Mansell *v.* Feeney, 2 Johnson & H. 320, where the defendant by affidavit admitted documents to relate to the matters in question in the suit, their production was ordered, though it was denied that they tended to prove the plaintiff's case (an alleged partnership), or that the plaintiff's name appeared in them. Even under the 14 & 15 Vict. c. 99, s. 6, the plaintiff is entitled to the production of these documents.

*ERLE, C. J.—The enactment in question is a very salutary one if properly carried out; but it may be a source of misera- [*543

(a) On the ground, it was stated, that the affidavit was not sufficiently specific as to the documents sought to be discovered, and that the production of communications between an insurance company and its agent, or between one insurance company and another, was a new course of practice in such cases.

ble mischief if construed with too much laxity. With regard to those communications which have reference to the charge of fraud, we incline to grant the rule: and also with respect to the reports on the salvage. But as to the rest we think there should be no rule.(*a*)

Karslake, Q. C., and *Garth*, now showed cause, upon affidavits which stated, that whatever communications passed between Mr. Charles Freeth, jun., and the Sun Fire Office Company, or between Mr. Freeth and the Atlas Insurance Office or the Hand-in-Hand Insurance Office, or between the Sun Fire Office Company and the two other insurance offices above mentioned, the same were communications of a confidential nature, and it was submitted that the defendant ought not to be required to disclose their contents; that, on the hearing of a summons in this action to the same effect as this rule, and of a summons in another action by the plaintiff against the Atlas
*544] Assurance Company to *show cause why the plaintiff should not be at liberty to inspect and take copies of the catalogue of pictures deposited with the Atlas Assurance Company when the insurance was effected, Willes, J., made an order in the last-mentioned action, that the plaintiff should be at liberty to take a copy of the said catalogue of pictures; and, as regarded the summons in this action, the learned judge appealed to the defendant's counsel whether there was any reason for withholding from the plaintiffs the contents of any communications that had passed between the parties; whereupon the counsel for the office at once consented to give copies and inspection of any letters or documents that had been sent by either party to the other, and an order was made to that effect, but was never drawn up; that,—in reference to the statement in the affidavits filed by the plaintiff as to a report or reports of certain officers appointed by the company to go over the debris of the house after the happening of the fire, and of the articles of the salvage found in process of such examination, and also reports upon the salvage so recovered by officers or others appointed to inspect the same, as also from the fireman who had been in charge of the ruins,—the only report of the kind which was ever made was made by the surveyor to the Sun Fire Office Company after this action was brought, for the sole use and information of the directors of the said office, and for the use of their attorney in preparing the defence to the action; that the ruins were sorted and sifted at a very great expense to the company, for the purpose of obtaining all the information they could, and that the list of the said salvage so made as aforesaid was a portion of evidence in support of the defendant's case as confidential as was any other portion of the evidence contained in the briefs that had been delivered
*545] to counsel; and that the defendant's *attorney had at all times been willing that the plaintiff and his advisers should have

(*a*) The rule called upon the defendant to show cause [under 14 & 15 Vict. c. 99, s. 6], "why the plaintiff, his attorney or agent, should not be at liberty to inspect and take copies of or extracts from the documents mentioned in the 11th, 12th, 13th, 14th, and 15th paragraphs of the plaintiff's affidavit (the parts in italics, antè, pp. 539, 540), and of the lists of salvage, and reports thereon; and [under the 50th section of the Common Law Procedure Act, 1854,] why the defendant should not within three days answer on affidavit, stating what and which of such documents he had in his possession or power relating to the matters in dispute in this cause, or what he knew as to the custody they or any or either of them were in, and whether he objected, and, if so, on what grounds, to the production of such as were in his possession or power."

access to the salvage itself whenever he desired to do so, and the deponent had informed the plaintiff's solicitors that the salvage was open to his inspection at all times, and he had instructed the person in whose custody the salvage was, to give inspection of the same at all times to the plaintiff or his advisers for any purpose whatsoever. When a party comes to the court for discovery, he must show not only that the documents the discovery of which he seeks are in existence, but also that they are material for the support of his own case or in answer to the case set up by his adversary. The rule is thus laid down in Wigram on Discovery, 2d edit. 157, §§ 224–6: "The word 'material' is relative,—material with reference to the purpose for which discovery is given, i. e. material to '*the plaintiff's case.*' Now, the '*plaintiff's case*' (in the sense in which the words are here used) is that case upon which the parties are about to go to trial. It follows, then, that discovery which is not material to the proof of that case is not within the scope of this proposition, however it may otherwise be *connected with* the subject of the suit. This (it may be observed), if established, will go a long way towards proving that the *right* of a plaintiff to discovery is *restricted* to cases falling within the terms of this proposition."(*a*) "Lord Redesdale (Redes. Plead. 191), in speaking of the grounds of objection to discovery, says, 'As the object of the court, in compelling a discovery, is, either to enable itself or *some other court to decide on matters in dispute between the parties, the discovery sought must be *material* either to the relief prayed by the bill or to some other suit actually instituted or capable of being instituted.'(*b*) Again, Lord Redesdale (Redes. Plead. 306), in stating the general right of a plaintiff to a discovery of the matters alleged in the bill, says,—'provided they are necessary to ascertain facts *material* to the merits *of his case, and to enable him to obtain a decree.*'" Here, the affidavits altogether fail to show that the documents required are at all applicable to the plaintiff's case, or even that any such documents exist. [WILLES, J.—I have always understood, that, in order to obtain inspection, the affidavits must describe some specific document which the party claims the right to inspect. I had another reason for the course I adopted when the matter was before me at Chambers. Fraud was suggested: and it seemed to me that the defendant had a good reason for keeping the documents back.] It is submitted that reports and communications of the confidential character of those referred to are not within the rule. With respect to the reports on salvage, the affidavit in answer states that the only report of the kind which was ever made was made by the surveyor to the Sun Fire Office Company after this action was brought, for the sole use and information of the directors of the said office, and for their attorney's use in preparing the defence to the action; that the ruins were sorted and sifted at very great expense to the defendants, for the purpose of obtaining information; that the list of the salvage so made was a portion of evidence in support of

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(*a*) The "second proposition," p. 46,—"It is the right, as a general rule, of a plaintiff in equity to exact from the defendant a discovery upon oath as to all matters of fact which, being well pleaded in the bill, are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit."

(*b*) See Hare on Discovery 110, 112, 114.

their case as confidential as was any other portion of the evidence contained in their briefs; and that the company were at all times *willing and offered to allow the plaintiff and his advisers to have access to the salvage itself. Reports and documents of this private and confidential character, it is submitted, are not within the intention of the legislature.

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Bovill, Q. C. (*Hawkins*, Q. C., was with him), in support of the rule.—After the affidavits filed in answer, it is no longer a question whether the documents referred to exist or not, but whether they are clothed with any privilege which authorizes the defendant to withhold their production. [WILLES, J., referred to The Chartered Bank of India, &c., *v.* Rich, 11 Weekly Rep. 830, where, in an action against a late manager, charging him with improperly giving credit to certain persons in India, the court refused to allow the defendant to have inspection of communications tending to establish the case against him, which had passed between the bank and their officers in India after the dismissal of the defendant.] That was a totally different case from this. Here, the defendant by his pleas distinctly charges the plaintiff with fraud and something more. Ought he not to produce the documents upon which he rests the charge? One of the questions to be tried, is, whether or not the plaintiff has made a fraudulent claim. Is it unreasonable that the company should be called upon to produce the communications and reports of their officers upon which they agreed to insure the property? [ERLE, C. J.—So far as regards the reports relative to the value of the goods upon the premises at the time of the insurance, as at present advised, I think they should be produced.] As to any of the documents being of a confidential nature, that is no ground for refusing to order their production: Glyn *v.* Caulfield, 3 M'N. & G. 463. What can be more private and confidential than the books *of a railway company? and yet these were allowed to be inspected in Hill *v.* The Great Western Railway Company, 10 C. B. N. S. 148 (E. C. L. R. vol. 100). [BYLES, J.—It is not a question of privilege. Your affidavits do not describe the documents of which you seek discovery and inspection, which the Court of Exchequer, in Thompson *v.* Robson, 2 Hurlst. & N. 412, held to be essential. ERLE, C. J.—You should identify the documents you ask for.] The plaintiff gives the best description of them that he can: and the affidavits in answer remove the difficulty. The very object of discovery is to ascertain what documents your opponent has. [ERLE, C. J.—The affidavits upon an application of this sort should specify the documents: a mere vague suggestion of a suspicion that the defendant has in his possession something which may be useful to support the plaintiff's case, will not do. The affidavits of the plaintiff alone are clearly insufficient: if the application succeeds at all, it will be upon the aid afforded by the affidavits on the other side.] The court will decide this, like every other motion, upon a full consideration of all the materials which are placed before it. The object is to save the delay and expense of filing a bill in Chancery. [WILLIAMS, J.—I do not see how the affidavits produced by the defendant should in strictness help you. The statute gives this advantage to the party upon the condition of his filing an affidavit showing the existence of a document in

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the possession of his opponent which is material to his case. ERLE, C. J.—Let the defendant produce for the plaintiff's inspection any communications which passed between the directors and their agent Freeth at the time the policy was negotiated, relative to the existence or value of the things which formed the subject-matter of insurance.] We want the communications which passed between the Sun Fire Office and the *Hand-in-Hand and Atlas offices on the subject of these insurances. [*549

ERLE, C. J.—I think the documents I have mentioned alone should be produced; and I accompany this with an intimation that I entirely agree with what is laid down by the Court of Exchequer in Thompson *v.* Robson, 2 Hurlst. & N. 412. I do not think the plaintiff is entitled to the communications with the other offices, except so far as relates to the existence or value of the property insured. Nor do I think the plaintiff is entitled to the production of the communications made to the office by their servants as to the result of their examination of the ruins,—the office having already offered the plaintiff every facility to examine and make the most of them for himself. The plaintiff has no right to see that which will form the brief of the defendant.(*a*) The costs of this motion must be defendant's costs in any event of the cause.

WILLIAMS, J.—I must confess I do not see how the defective affidavits of the plaintiff can be cured by having resort to the affidavits of his opponent.

BYLES, J.—I quite concur in the remark of my Brother Williams. As to the lists of salvage, the application is clearly a fishing one.

The rule was drawn up as follows:—"It is ordered that the plaintiff, his attorney or agent, be at liberty to inspect and take copies of or extracts from all communications or copies of communications in writing in the possession or power of the Sun Fire Office, which passed between Mr. Freeth and the Sun Fire Office, and between him or the Sun Fire Office and the Hand-in-Hand Office and the Atlas Insurance Office relating *to the property or value of the property insured in those offices or either of them,—the defendant's costs of this application to the court to be costs in the cause for the defendant in any event thereof." (*b*) [*550

(*a*) Hunt *v.* Hewitt, 7 Exch. 244.

(*b*) The cause was tried at the Surrey Summer Assizes, 1863; and after an investigation of almost unprecedented length, the charges imputed by the pleas wholly failed to be substantiated, and the plaintiff obtained a verdict, which it was understood would be acquiesced in by all the offices concerned.

STEPHEN MAYHEW, Appellant; JAMES WARDLEY, Respondent. *June* 8.

Firing at game from a highway is a trespass in pursuit of game within the 1 & 2 W. 4, c. 32. And where two persons are jointly engaged in the unlawful act, they may be severally convicted thereof.

THIS was an appeal against a conviction of the appellant by two justices of the peace for the county of Suffolk, under the 1 and 2 W. 4, c. 32, s. 30, for trespassing in the day-time upon certain land, to

wit, a highway, situate in the parish of Tunstall, in the occupation of William Flatt, in search of game, contrary to the statute, &c.

The following case was stated for the opinion of the court pursuant to the 20 and 21 Vict. c. 43:—

Upon the hearing of the information, it was proved on the part of the informant, and found as a fact, that, on the day and at the place alleged, the defendant and another man (who was subsequently convicted of a similar offence, and whose case was to be governed by the present) were, about half-past seven in the morning (being day-time under the 34th section), standing close together on the highway, looking through a fence into a meadow occupied by Mr. William Flatt adjoining the highway; that a report of a gun was heard,—only one *report; that no other person was seen near the spot; that a witness named Savage went towards them, and they both ran away together towards Mr. Cockrell's yard; that no gun was seen, but Savage stated that he was sure it was fired by one of the two men; that, within a few minutes after the gun was fired, a boy named Garrod picked up a partridge (quite warm) in the meadow, within eighteen yards of the fence where the men had been standing; that William Reeve, who was in Mr. Cockrell's yard, heard the report of a gun, and shortly afterwards two men met him, Stephen Mayhew being one of them; and that Mayhew then said to Walter Reeve (another witness) "If you see any one ask about us, don't you know anything."

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It was contended on the part of the defendant that the informant proved no offence which was cognisable by law; that there could be no trespass upon the highway in search of game; that, if a trespass at all, the trespass ought to have been alleged as being upon the meadow; that the two men ought to have been charged as committing a joint offence; that, as they were charged separately, it was necessary to prove that one of them fired the gun; and that the other could not then be convicted.

The question for the opinion of the court was, whether the justices were correct in point of law in their determination, and what should be done in the premises.

No one was instructed to support the appeal.

Markby, for the respondent, referred to The Queen *v.* Pratt, 4 Ellis & B. 860 (E. C. L. R. vol. 82), 1 Dears. C. C. 502, where a "highway" was held to be "land" within the meaning of the statute; and also to Brown, app., Turner, resp., 13 C. B. N. S. 485. There, A., B., C., and *D., four labourers, were met by a police-constable early one Sunday morning on the high road leading from Coggleshall to Braintree. Suspecting from their appearance that they had been poaching, and seeing that there was something bulky in the pocket of A., the constable searched him (the other three walking away), and drew from his pocket five wild rabbits which had been recently killed, and an iron spud. The constable then followed B., and found in his pocket a net suitable for taking rabbits and which appeared to have been recently used, and some rabbit's fur, and fresh blood on his coat-cuffs. The constable afterwards found that C. had at a subsequent hour on the same morning sold a dead wild rabbit at a beer-house for 6*d.* It was held that the magistrates were justified

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in inferring from the above evidence, as against A., B., and C., that they had been unlawfully on some land in search or pursuit of game, within the 25 and 26 Vict. c. 114, *although there was no proof that either of the parties had been seen off the high road.* [WILLES, J.—It is quite clear that a person using a highway otherwise than for the purpose of passing and re-passing over and along it, is a trespasser. There was abundant evidence here to warrant the justices in coming to the conclusion that the appellant and his companion were upon the highway in question for the purpose of poaching.]

ERLE, C. J.—I am of opinion that the decision of the magistrates was right, and that the conviction must be sustained. Two questions of law seem to be submitted to us in this case. The first is, whether a person can be guilty of a trespass within the meaning of the statute 1 and 2 W. 4, c. 32, by standing upon a public highway for the purpose of killing game. I think that question is concluded by the decision of the Court of *Queen's Bench in The Queen *v.* Pratt, 4 Ellis & B. 860 (E. C. L. R. vol. 82), 1 Dears. C. C. 502. [*553 The right of the public is a mere easement. By using the highway for an unlawful purpose,—for destroying game, for instance,—the party clearly is guilty of a trespass. The other question is, whether the two offenders should not have been convicted jointly; they being together on the highway in the execution of a common purpose. Upon the evidence before them, the justices might well have inferred that the two were out for the common purpose of unlawfully killing game, and that the unlawful act was the act of each. This is all that is submitted for the opinion of the court.

WILLIAMS, J.—I entirely agree with my Lord on the points of law. We have nothing to do with the question of fact.

WILLES, J., concurred.

BYLES, J.—I most unwillingly agree to this construction of a highly penal statute: but I feel constrained to do so by the authorities. Appeal dismissed.

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*HUGH MULLENEUX LAWRENCE, Appellant; ROBERT TODD, Respondent. *June* 8. [*554

An iron-ship-builder contracted in writing with six skilled handicraftsmen to plate a vessel, they agreeing exclusively to serve him subject to the rules and regulations of the yard, and to execute the whole of the skilled and unskilled labour requisite to complete the entire hull of the vessel, of the best workmanship and to the entire satisfaction of their employer (they employing and paying such skilled and unskilled assistants as might be requisite to complete the vessel with all despatch), and to be paid 5*l.* per ton for the work so done by them:—

Held, that the contracting parties were "handicraftsmen or artificers," within the meaning of the 4 G. 4, c. 34, s. 3.

THIS was a case stated by T. S. Raffles, Esq., stipendiary magistrate for Liverpool, under the 20 & 21 Vict. c. 43, for the opinion of this court:—

1. The appellant carries on business in the borough of Liverpool as an engineer and iron-ship-builder under the firm of H. M. Lawrence & Co., and, at the time of the making of the agreement next hereinafter mentioned, had commenced to build and had laid the keel and

partly set up the frames of an iron vessel in his ship-building yard there.

2. The respondent is an angle-iron smith and plater, and is a skilled handicraftsman.

3. On the 15th of October, 1862, the appellant entered into an agreement with the respondent and six other persons, viz., Thomas Clarke, James Thomas, Henry Lloyd, Thomas Quinn, James Davidson, and Thomas Boswell (who were also angle-iron smiths and platers and skilled handicraftsmen), for the completion by them in the said appellant's said ship-building yard of the said iron vessel, and which said agreement was signed by the appellant and the respondent and the said other persons.

4. The following is a copy of the agreement:—"It is agreed this 15th day of October, 1862, between Hugh Mulleneux Lawrence, carrying on business at Sandon Works, Sefton Street, Liverpool, as engineer and ship-builder, under the firm of H. M. Lawrence & Co., of the one part, and Thomas Clarke, James Thomas, Robert Todd, Henry Lloyd, Thomas Quinn, James Davidson, and Thomas Boswell, angle-iron smiths and platers, all of Liverpool, of the other part, as
*555] follows,—First, that *H. M. Lawrence shall employ, and each of them the said Thomas Clarke, James Thomas, Robert Todd, Henry Lloyd, Thomas Quinn, James Davidson, and Thomas Boswell, *shall exclusively serve* to the best of his ability the said Hugh Mulleneux Lawrence, and subject in every respect to all the rules and regulations of his yard for the time being, for the purposes and on the terms hereinafter mentioned,—Secondly, that the said Thomas Clarke, James Thomas, Robert Todd, Henry Lloyd, Thomas Quinn, James Davidson, and Thomas Boswell shall enter the service of the said H. M. Lawrence in order to execute the whole of the skilled and unskilled labour requisite to complete in every respect, of the very best workmanship, and to the satisfaction of the said H. M. Lawrence, the entire iron hull of the vessel now building in his yard, and known as No. 8 vessel, the keel whereof is at present laid and the frames in part set up; and for this purpose the said James Thomas, Thomas Clarke, Robert Todd, Thomas Quinn, Henry Lloyd, James Davidson, and Thomas Boswell shall employ such skilled and unskilled assistants as the said H. M. Lawrence shall deem requisite in order to complete the said vessel with all despatch, such assistants to be paid by the said Thomas Clark, James Thomas, Thomas Boswell, Thomas Quinn, Robert Todd, Henry Lloyd, and James Davidson, and to be subject in every way to the rules and regulations for the time being of the yard and of the said H. M. Lawrence, including liability to discharge by him, and as if each had entered the service of the said H. M. Lawrence,—Thirdly, that the said H. M. Lawrence shall pay the said Thomas Clarke, James Thomas, Robert Todd, Henry Lloyd, Thomas Quinn, James Davidson, and Thomas Boswell, or any of them, for their joint account, for each and every ton weight of iron-
*556] work executed and entirely completed to the *satisfaction of the said H. M. Lawrence by the said Thomas Clarke, James Thomas, Robert Todd, Henry Lloyd, Thomas Quinn, James Davidson, and Thomas Boswell, and their assistants, the sum of 5*l.*, and for every fractional portion of a ton a similar rate in proportion, such

rate to be calculated on the net weight of each piece of ironwork after being punched, sheared, drilled, and fitted to its respective place, and which sum shall be paid on every Saturday, the pay-day of the yard, less 10 per cent., which shall be retained by the said H. M. Lawrence until the completion of the entire work to his satisfaction, as a security for the work being duly fulfilled,—Fourthly, that if any one or more or all of them the said Thomas Clarke, James Thomas, Robert Todd, Henry Lloyd, Thomas Quinn, James Davidson, and Thomas Boswell, or other their assistants employed by them as aforesaid shall at any time, in the opinion of the said H. M. Lawrence, during the term of this service be guilty of any neglect or delay in executing the said work, or if such assistants shall be deficient in numbers or ability, it shall be lawful for the said H. M. Lawrence,—but without prejudice to any other redress arising out of the relation of master and servant hereby created,—to employ other hands to complete the said work, and charge any one or more or all of them the said Thomas Clarke, James Thomas, Robert Todd, Henry Lloyd, Thomas Quinn, James Davidson, and Thomas Boswell, with the extra cost thereby incurred."

5. After the making of the said agreement, the respondent and the said other persons at once commenced to execute the work to be performed by them under the said agreement, and continued to perform the same and to work upon the said vessel until the 6th of April, 1863.

6. On the last-mentioned day, the respondent and *two of the said other persons, viz. Thomas Clarke and Henry Lloyd, refused further to go on with the said work, and without the consent of the appellant wilfully absented themselves from the said ship-building yard of the appellant, and did no work upon or to the said vessel during the whole of that day. [*557

7. The said vessel was not at that time completed; and there was no lawful excuse for the respondent or the said other persons refusing to go on with the said work or absenting themselves from the said ship-building yard.

8. In consequence of such refusal to go on with the said work by the respondent, and such absenting himself, the said work could not be nor was carried on with due despatch, and the completion of the said vessel was and is greatly delayed.

9. It was intended by the appellant and respondent and by the said other parties to the said agreement, and it was necessary for the purpose of carrying out the said agreement, that the respondent and the said other parties to the said agreement should themselves do and perform such of the work necessary for completing the said vessel as required skilful handicraftsmen for its proper performance, and should employ workmen of inferior skill and labourers for the purpose only of assisting them in such portion of the works as required little or no skill: and the respondent and the said other parties to the said agreement did in fact themselves so work and employ others to assist them.

10. It is customary in the ship-building trade for skilful workmen to employ persons of inferior skill to assist them in their work.

11. The respondent and the said other persons were under the

control of and bound to obey the orders and directions of the appellant's foreman of the appellant's ship-building yard with respect to the said work.

*558] *12. On the 7th of April, 1863, an information and complaint under the 3d section of the statute 4 G. 4, c. 34, came on to be heard before the magistrate, by which the appellant complained that the respondent on the 15th of October, 1862, at the borough aforesaid, contracted with the appellant to serve him in the capacity of a handicraftsman in a certain manner, to wit, to execute the whole of the skilled and unskilled labour requisite to complete in every respect, of the best workmanship and to the satisfaction of the appellant, the entire iron hull of a certain vessel; and that the respondent, having entered upon such service accordingly, afterwards, to wit, on the 6th of April, 1863, at the said borough of Liverpool, where the respondent was then and there employed, without notice, and before his said contract was completed, unlawfully, without the said Hugh Mulleneux Lawrence's consent, and without just cause or lawful excuse, did absent himself from the said service, and had from thence neglected to fulfil his said contract, contrary to the form of the statute in such case made and provided.

13. The magistrate was of opinion that the agreement set out in the fourth paragraph of the case, and the facts aforesaid, did not create such a relation between the appellant and respondent as to bring the respondent within or subject him to the 3d section of the statute 4 G. 4, c. 34; and he declined to convict the respondent; otherwise he would have convicted him.

14. The question for the opinion of the court was, whether the said agreement and the facts aforesaid created such a relation between the appellant and respondent as to bring the respondent within or subject him to the 3d section of the said statute.

*559] *Watkin Williams*, for the appellant.—The magistrate ought, it is submitted, to have convicted the respondent. The question turns upon the construction of the 3d section of the 4 G. 4, c. 34, which enacts, that, "if any servant in husbandry, or any *artificer*, calico-printer, *handicraftsman*, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall contract with any person or persons whomsoever to serve him, her, or them for any time or times whatsoever, or *in any other manner*, and shall not enter into or commence his or her service according to his or her contract (such contract being in writing, and signed by the contracting parties), or, having entered into such service, shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same,—then and in every such case it shall and may be lawful for any justice of the peace of the county or place where such servant in husbandry, &c., shall have so contracted or be employed or be found, and such justice is hereby authorized and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them, with whom such servant in husbandry, &c., shall have so contracted, or by his, her, or their steward, manager, or agent, which oath such justice is hereby empowered to administer, to issue his war-

rant for apprehending every such servant in husbandry, &c., and to examine into the nature of the complaint; and, if it shall appear to such justice that any such servant in husbandry, &c., *shall not have fulfilled such contract*, or hath been guilty of any other misconduct or misdemeanor as aforesaid, it shall and may be lawful for such justice to commit every such person to the house *of correction, there [*560 to remain and be held to hard labour for a reasonable time, not exceeding three months," &c. The magistrates probably thought from the mode of payment of their wages that these men were contractors. [WILLIAMS, J.—Relying upon Hardy *v.* Ryle, 9 B. & C. 603 (E. C. L. R. vol. 17), 4 M. & R. 295, and that class of cases.(*a*)] No doubt. There, however, there was no contract exclusively to serve the employer: here there is. The distinction is pointed out in Lancaster *v.* Greaves, 9 B. & C. 628. There, A. had contracted with B. to build a wall for a certain price within a certain time, and having performed part of the work, refused to complete it; and it was held that this was not a contract within the statute. Littledale, J., there says: "The relation of master and servant is essential in order to give the court jurisdiction." And Parke, B., says: "The statute applies only to cases of contracts to serve. There may, indeed, be a service not for any specific time or wages: but, to be within the statute, there must be a contract for *service to the party exclusively*." And Bayley, J., in Hardy *v.* Ryle, 9 B. & C. 611, says: "To be within the act, the party must not only be included in the enumeration of persons to be affected by it, but must also have 'contracted to serve.' Now, there is a very plain distinction between becoming the servant of an individual, and contracting to do certain specific work. The same person may contract to do work for many others, and *cannot [*561 with any propriety be said to have contracted to serve each of them." The facts here take the case entirely out of the principle of those decisions. [WILLIAMS, J.—In Ex parte Johnson, 7 Dowl. P. C. 702, a contract "to print certain pieces of woollen cotton goods" was held not to be within the statute. WILLES, J.—In Riley *v.* Warden, 2 Exch. 59, it was held that a person who takes a contract to execute a certain cutting on a railway, at a certain sum per cubic yard, and employs certain men under him to assist in doing the work, is not a *workman* or *labourer* within the Truck Act, 1 & 2 W. 4, c. 37, although he does a portion of the work himself. But that was corrected in Bowers *v.* Lovekin, 6 Ellis & B. 584. There, by agreement with a mine-owner, two persons engaged as "butty-colliers:" it was found as a fact that butty-colliers get the produce of the mine at so much per yard, that they employ others under them to increase the quantity, but that they must work personally, and are treated as workmen: and it was held, upon this finding, that butty-colliers were artificers (labourers?) within the Truck Act,—the distinction between contractors and artificers depending on the fact whether by the engagement they were labourers. This is a stronger case than that; for,

(*a*) In Hardy *v.* Ryle, the commitment recited that Henry Hardy had contracted to weave certain pieces of silk goods for Thomas Hall at certain prices agreed upon between them, and had neglected his work after entering upon his said service, wherefore the justice convicted him, and committed him for one month: and it was held that the contracting to weave certain goods, as stated in the commitment, was not contracting *to serve* within the meaning of the statute.

here, the parties were not at liberty to employ others under them except subject to the control of Lawrence.] In Bowers *v.* Lovekin, Erle, J., says: "I take the true construction of the act to be, that it applies to contracts for artificers' work to be paid for by the piece, whenever it was intended that the contractor should personally do all or part of the work as a workman, so as to make him one of the class of artificers. I agree with what is observed by Maule, J., in Sharman *v.* Sanders, 13 C. B. 166 (E. C. L. R. vol. 76), that the legislature intended to protect
*562] a particular class. I think in such cases you must *look at the nature of the work, the contract, and the position of the parties, and say whether they were of that class." [BYLES, J.—The hours of work are not mentioned here.] No: but the parties agree to be subject to all the rules and regulations of the yard. The mode of payment,—5*l.* per ton on the amount of work done,—does not take the case out of the statute: Ex parte Bailey, 23 Law J. M. C. 161. Ex parte Gordon, 25 Law J. M. C. 12, is a very strong authority. There, Gordon was employed by Scholefield, a master tailor, to make clothes as he should be required, each garment to be paid for according to an agreed list of prices. When engaged on a job, Gordon was to work on the premises of Scholefield, and for him exclusively, until the job was finished. At the end of each job Gordon could leave if he chose, and Scholefield was not bound to find him any more work. It was held, that, as Gordon during any particular job was to work exclusively for Scholefield, the relation of master and servant existed between them, and that he was liable under the 4 G. 4, c. 34, s. 3, to punishment by summary conviction for having neglected to complete a waistcoat which he had commenced to make for Scholefield. [WILLIAMS, J.—The contract here is for a particular piece of work, not for a general employment.] Any difficulty on that score is removed by the judgment of Wightman, J., in Ex parte Gordon. "The contract," says that learned judge, "did not extend beyond the particular job; but, during that job, and until it was finished, he (Gordon) was to work exclusively for his employer. I was struck at first with the strong analogy that appeared between this case and the cases of Lancaster *v.* Greaves, Hardy *v.* Ryle, and Ex parte Johnson: but, in all those cases, the decision that the party was not a servant turned mainly
*563] upon the circumstance that, during the continuance of the *particular employment, the party was at liberty to work for other persons. But here Gordon was to work on the premises of his employer, and for him only, until the work was done. Gordon therefore is, I think, brought within the words of the statute as an 'artificer or handicraftsman' 'or other person,' who had contracted to serve 'for any time or times whatsoever, or in any other manner.' These last words 'in any other manner' seem to me very important." And in Taylor, app., Porter, resp., 31 Law J. M. C. 111, it was held, that, in order to give justices jurisdiction to hear a complaint as to the non-payment of wages, under the 20 G. 2, c. 19, s. 1, it is only necessary that the relation of master and servant should exist between the parties, and the contract of service need not be for any specific time. Here, personal service, exclusive service, and the mode of payment of wages (if that be material), are all provided for by the contract. In Lowther *v.* The Earl of Radnor, 8 East 113, the 20 G. 2, c. 19, was

held to include wages earned by a labourer who contracted to dig and stean a well for cattle, to be paid for by the foot, and who employed another to assist him in the work. In Blake *v.* Kenyon, 6 T. R. 221, which was an action for continuing to employ the plaintiff's servant (who had left his work as a currier unfinished), after notice, the court say that "a person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master." These authorities, it is submitted, abundantly show that the respondent ought to have been convicted.

No one appeared for the respondent.

ERLE, C. J.—The court is much indebted to Mr. *Williams for his very careful and lucid exposition of the law in this case. [*564 His argument has satisfied me that the decision of the magistrate was wrong, and that the appellant is entitled to succeed. The agreement which the respondent entered into is clearly within the statute, the operative words of which are, that, if any *artificer, handicraftsman, labourer*, or *other person* shall contract with any person or persons whomsoever to *serve* him, her, or them, for any time or times whatsoever, or *in any other manner*, and shall not enter into or commence his or her service or, having entered into such service, shall absent himself or herself from his or her service before the term of his or her contract shall be completed, &c., he or she shall be liable to be convicted, &c. Were the parties to this agreement "handicraftsmen" within those words? It appears from the agreement that the appellant was an engineer and ship-builder, and had contracted to build an iron-clad vessel, and that the other parties to the agreement were handicraftsmen skilled in laying plates. And it is clear to my mind that their skill was an important element in the inducement to him to enter into the contract with them. By the terms of the agreement they severally undertook to serve the appellant exclusively, to the best of their ability, and subject in every respect to all the rules and regulations of his yard, for the purposes and on the terms after mentioned: and these were "to execute the whole of the skilled and unskilled labour requisite to complete in every respect, of the very best workmanship, and to the satisfaction of the appellant, the entire iron hull of the vessel," and for this purpose to "employ such skilled and unskilled assistants as the appellant should deem requisite in order to complete the said vessel with all despatch,"—such assistants to be paid by them, and to be subject in every way to the rules *and regulations of the yard and of the appellant, including liability to [*565 discharge by him, and as if each had entered his service: and they were to be paid for their services the sum of 5*l.* for each and every ton weight of ironwork executed and entirely completed to the appellant's satisfaction. I have looked in vain to see where the difficulty was. These parties clearly come within the definition of "handicraftsmen or artificers." That the spirit of the statute was intended to apply to such a case, is perfectly manifest. The appellant had no doubt contracted to deliver the ship completely finished and fitted by a given day; and this he could not reckon upon accomplishing unless he could be secure of the co-operation of his workmen, and he makes his contract with them accordingly. This is exactly the case for the applica-

tion of the summary remedy provided by the statute; as, without some such check, his workmen might at any time frustrate all his arrangements. Two of the six persons parties to the agreement have wilfully absented themselves, without lawful excuse. It has been held that a man who was hired to do a particular job,—as a tailor to make a garment,—comes within the description of a labourer in this statute,—Ex parte Gordon, 25 Law J. M. C. 12: and there are many other cases to the same effect. Here, the parties expressly engaged to remain in the service until the particular work was completed. Does the stipulation for payment at the rate of 5*l.* per ton prevent the parties from being labourers within the act? I think not. The words of the statute are very wide: they embrace all contracts of service either for time or in any other manner. True, the party must be in the exclusive service of the employer for a given time or until the completion of the given work; but, whether paid by the day or by the quantity of work done, is immaterial. The case *gives no detailed account of the opinion of the magistrate. Out of respect for his decision, we have searched for precedents, but are unable to find any to justify it. The case must go back to him with our answer in the appellant's favour to the question submitted to us.

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WILLIAMS, J., and WILLES, J., concurred.

BYLES, J.—I agree with the rest of the court; and I would only add that my judgment proceeds on the case of Boers *v.* Lovekin, 6 Ellis & B. 584 (E. C. L. R. vol. 88), and the reasons there given.

Judgment for the appellant.

SHIPLEY *v.* MARSHALL. *May* 23.

"Book-debts" in the 24 & 25 Vict. c. 134, s. 137, are such debts accruing in the ordinary course of a man's trade as are usually entered in the trade-books.

A., who carried on the business of a saddler, and had also been in the habit of buying and selling copyrights of newspapers (having had seven or eight transactions of the kind within three years), became bankrupt. He afterwards purchased from the assignees, under the 137th section of the Bankruptcy Act, 1861, all the outstanding *"book-debts"* due to his estate. Prior to his bankruptcy he had by an agreement in writing contracted to sell to B. the copyright of a certain newspaper and the back numbers, the purchase-money to be paid by certain instalments, of which 227*l.* 10*s.* remained unpaid at the time of A.'s bankruptcy. The agreement contained a stipulation that the instalments should be secured by a mortgage of the copyright to A No entry of this transaction appeared in A.'s ordinary trade-books; but it was entered in his "diary:"—Held, that this was a debt which passed by the sale by the assignees of the "book-debts" due to the bankrupt, under the 137th section.

THIS was an action brought to recover a balance claimed to be due from the defendant on the sale of a newspaper called The Lamb, together with certain back numbers.

The declaration contained a special count upon the contract, and the common counts. The defendant pleaded, amongst other pleas, the bankruptcy of the plaintiff; to which the latter replied a sale by the assignees to him by private contract of the outstanding book-debts due to him at the time of his bankruptcy. Issue thereon.

*The cause was tried before Williams, J., at the sittings at Westminster after the last term, when the following facts appeared in evidence:—The plaintiff (the bankrupt) carried on the busi-

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ness of a saddler and harness-maker, and he had been in the habit of buying and selling copyrights of newspapers, having been possessed at various times within the last three years of as many as seven or eight, of which The Lamb was one. This he had sold to the defendant (with 62*l.* for the back numbers) for 500*l.*, payable by certain instalments, with a stipulation that these instalments should be secured by a mortgage. No entry of this transaction appeared in the trade-books of the bankrupt; but a record of it was found in his diary. Of the above sum 227*l.* 10*s.* remained unpaid.

The bankrupt had, under the 137th section of the Bankruptcy Act, 1861, bought from the assignees all the outstanding book-debts due to his estate.

On the part of the defendant it was submitted that this was not a "book-debt" within the 137th section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, which enacts that "at any time after the expiration of twelve months from adjudication, or at any earlier period with the approbation of the court, the assignees may sell by auction or tender, or, with the sanction of the court, by private contract, all or any of *the book-debts due or growing due to the bankrupt*, and *the books relating thereto*, and the good-will of his trade or business, and assign the same to the purchaser; and such purchaser shall, by virtue of the assignment, have power to sue in his own name for the debts assigned to him, as effectually, and with the same privileges concerning proof of the requisites of bankruptcy and other matters, as the assignee himself."

The learned judge reserved the point, and the jury returned a verdict for the plaintiff, damages 227*l.* 10*s.*

**J. O. Griffits*, in Easter Term last, accordingly obtained a rule nisi to enter a nonsuit. He submitted that an exceptional [*568 transaction like this could not have been contemplated as a book-debt within the statute: and he referred to McEvoy *v.* Bent, 11 Weekly Rep. 314, where Martin, B., said: "A book-debt must mean debts entered in the books of a bankrupt in the course of his business, whatever that may be."

Montague Smith, Q. C., now showed cause.—The 137th section of the 24 & 25 Vict. c. 134, empowers the assignees to sell the book-debts of the bankrupt, and enables the purchaser to sue for them in his own name. The question is, what is the meaning of "book-debts?" Is it limited to debts entered in some book? That can hardly be. Suppose a tradesman keeps no books? It may be that the term "book-debts" would not embrace specialty debts, such as bonds, mortgages, or judgments: but it clearly must include all debts accruing to the bankrupt in the course of his trade. That reduces it to the question what was this man's ordinary trade? The evidence shows, that, besides carrying on the business of a saddler and harness-maker, the plaintiff was in the habit of buying and selling copyrights of newspapers. A debt accruing to him in that business was as much a trade debt as a debt for saddlery would be. In McEvoy *v.* Bent, a new trial was granted, notwithstanding Baron Martin's dictum. Besides, it did not appear there that the bill of exchange was given in the course of, or in any way connected with, the bankrupt's trade.

Griffits, in support of his rule.—The term "book-debts" has ac-

quired a known meaning, which does not embrace a claim arising upon an agreement like this. Under the old bankrupt acts, the bank-
*569] rupt's property in *the first instance vested in the commissioner, who, under the 6 G. 4, c. 16, s. 63, was to convey to the assignees, amongst other things, all "debts due or to become due" to the bankrupt. The 87th section gave the assignees power to compound or give time for the payment of debts, but no power to sell them. By the Bankrupt Law Amendment Act, 1849 (12 & 13 Vict. c. 106), s. 141, all the personal estate and effects of the bankrupt, and "all debts due or to be due to him," are absolutely vested in the assignees by virtue of their appointment. The 153d section empowered the assignees to sue or compound for debts. And the 188th section enacted, that, if, at the expiration of two years from the issuing of any fiat, or the filing of any petition for adjudication of bankruptcy, there shall remain any outstanding debts *or other property* due or belonging to the estate of the bankrupt, which cannot, in the opinion of the court, be collected and received without unreasonable or inconvenient delay, it shall be lawful for the assignees, under the direction of the court, to sell and assign such debts *and other property*, and also the books of the bankrupt relating to his trade, dealings, or estate, in such manner and subject to such conditions as shall be ordered by the court; and any person to whom any of such debts shall be so sold or assigned may sue for the same in his own name as fully as the assignees of such bankrupt might have done." This section is repealed by the Bankruptcy Act, 1861, the 137th section of which confines the power of sale to "book-debts due or growing due to the bankrupt, and *the books relating thereto*." The whole spirit of the act shows that this provision was intended to be limited to the common and ordinary book-debts of a trader, and not to apply to a debt arising out of a contract like this, with special terms which could only
*570] be enforced in a court of equity. [ERLE, C. J.—The defendant *owed the bankrupt 227*l.* 10*s.*, the balance of a debt due upon the sale of a newspaper. If he had contracted a debt with the bankrupt to the amount of 50*l.* for saddlery, and had given him his acceptance for it, and the bill had come back dishonoured, would that have been a book-debt?] No doubt that would remain a simple contract debt: the bill being unpaid, the trade-debt would remain. But, can a debt accruing to a saddler upon a sale of a newspaper copyright in any sense be considered as an ordinary trade-debt? [BYLES, J.—If a guarantee were given in respect of a trade-debt, would that pass?] The statute does not by the 137th section authorize the sale of securities. A statutory power must be pursued strictly. It is enough to say that this is a special contract, and not a book-debt.

ERLE, C. J.—I am of opinion that this rule should be discharged. The plaintiff, a bankrupt, purchased from his assignees, under the 137th section of the Bankruptcy Act, 1861, "the book-debts due or growing due to him" at the time of his bankruptcy; and the question is whether the balance due to him from Marshall under the contract entered into by him with the plaintiff answers the description of a "book-debt" within the above section. By "book-debts," the legislature doubtless intended to describe debts in some way connected with the trade of the bankrupt: and I am inclined to give the term a

wider range. But it is enough to say that this was a debt connected with and growing out of the plaintiff's trade. The plaintiff was possessed of copyrights of newspapers: one of these the defendant purchased of him for 500*l.*, and 62*l.* for the price of the back numbers. Why should not that constitute a trade-debt? The plaintiff had been in the habit of buying and selling that kind of property. It seems to me that a debt thus arising is just as much a *debt connected with his trade or business of a dealer in newspapers, as [*571 a debt for saddlery would be connected with his trade of a saddler and harness-maker. I therefore think the *debt* passed by this assignment. Whether the *security* passed, is quite a different question. If a guarantee were given to secure a trade-debt, the document would not pass by the assignment, though the debt would. In the agreement in question there is a stipulation for a mortgage. By the purchase of the debt, the plaintiff did not acquire the right to call upon Marshall to execute a mortgage of the copyright to him. That is a totally different matter. The course of the enactments has been to enable the assignees to dispose of all the outstanding debts and property of the bankrupt. The 188th section of the 12 and 13 Vict. c. 106 enabled the assignees, at the end of *two* years from the issuing of the fiat or the filing of the petition, to sell the outstanding debts or other property due or belonging to the bankrupt. The 137th section of the recent Bankruptcy Act shortens the period to *one* year, and narrows the subject-matter of the sale to "book debts" of the bankrupt, which I hold to mean all debts contracted with him in the course of his trade. This plaintiff carried on the trade of a saddler and also that of a speculator in newspaper copyrights. To constitute the debt a "book-debt," it cannot to my mind be necessary that the transaction should be entered in a book.

WILLIAMS, J.—I am of the same opinion. The words of the 137th section are no doubt as Mr. Griffits has pointed out, authorizing the assignees to sell the "book-debts due or growing due to the bankrupt, and the books relating thereto." This, it is said, can only mean debts which are actually entered in some book kept by the bankrupt in the course of his trade. I *cannot, however, accede to that [*572 construction. I think the meaning of the statute is, that the assignees shall dispose of all debts due to the bankrupt in respect of which entries could be made in the ordinary course of his business: otherwise, a debt by accident omitted to be entered would not pass by the assignment. But the difficulty which I feel in this case, is, to arrive at the conclusion that this is a debt arising out of a transaction which in the ordinary course of the bankrupt's business would find its way as an entry into any of the trade-books. The bankrupt was a saddler and harness-maker: and he calls himself a newspaper proprietor. No entry of this transaction with the defendant appears in any of the bankrupt's ordinary trade-books: but an entry of it does appear in his "diary." The rest of the court have come to the conclusion that this is a "book-debt" within the meaning of the statute: and, although I must confess I entertain some doubts, yet upon the whole they are not so strong as to induce me to differ from them.

WILLES, J.—I entirely agree with my lord that this was a "book-

debt" within the fair meaning of the 137th section of the 24 and 25 Vict. c. 134.

BYLES, J.—I am of the same opinion. The facts are these:—The plaintiff before and at the time of his bankruptcy carried on the business of a saddler and harness-maker. He was also engaged in the purchase and sale of copyrights of newspapers,—having bought and sold as many as seven or eight in the course of three years. He was, therefore, as much a trader in copyrights in newspapers as he was in saddles and bridles. He might have sold the goodwill of the one trade as well as of the other. The 137th section empowers the assignees *573] to sell and assign to a purchaser *"all or any of the book-debts due or growing due to the bankrupt, and the books relating thereto, and *the goodwill of his trade or business.*" It is said that "book-debts" must mean debts which are entered in the trade-books of the bankrupt. I agree with my Brother Williams that they must be such debts as are commonly entered in books. It is contended that the transaction in question is not a debt of that description, because there is a stipulation for a mortgage security. But, suppose the case of a saddle bought by a customer for 5*l.*, a particular saddle appropriated to but not accepted by the customer: the tradesman has a lien upon the article for the price agreed: he becomes bankrupt: the debt and the right of lien pass to his assignees: to sustain his argument, Mr. Griffits must contend that that would not be a debt which the assignees could dispose of under this section. I must confess I do not feel embarrassed by the doubts suggested by my Brother Williams. I think his ruling at the trial was quite right. Suppose the trader kept no books, or was blind and could not write, and did not choose to incur the expense of keeping a clerk or book-keeper,—upon the construction contended for by the defendant, there could be no book-debts which could be made the subject of sale and assignment under the 137th section of the Bankruptcy Act, 1861. That surely would not be a very sensible construction to put upon the statute. Rule discharged.

*574] *DRESSER *v.* NORWOOD and Another. *April* 23.

A principal is (at law) affected with notice of all circumstances which come to the knowledge of his agent in the course of his employment as such: but not with knowledge acquired by him aliunde.

A. placed goods in the hands of H., a factor, for sale on a del credere commission. B. bought them through the agency of C., a broker, who had prior knowledge of the fact that they were the property of A., which knowledge, however, was not communicated to B., who purchased bonâ fide, although he knew that H. was in the habit of selling goods *as factor*:—Held, that B. not being affected by the knowledge of C., the broker was entitled to set off against the price of the goods so bought for him a debt due to him from H.

THIS was an action for goods sold and delivered, &c., with a count upon a guarantee, as follows:—

"That, in consideration that the plaintiff, at the defendants' request, would sell and deliver to Marmaduke Chaplin certain deals and deal-ends at the price or sum of 9*l.* 10*s.* per standard hundred of deals, and 7*l.* 10*s.* per standard hundred of deal-ends, to be paid for by the said Marmaduke Chaplin by cash within a month, less 2½ per cent.

discount, the defendants promised the plaintiff that they would guarantee the fulfilment of the said contract of sale of the said deals and deal-ends by the said Marmaduke Chaplin; that, although the plaintiff, relying on the said promise, sold and delivered to the said Marmaduke Chaplin the said goods at the price and on the terms aforesaid, and the said price of the said goods was long since due and payable to the plaintiff; yet the said Marmaduke Chaplin had not paid the price of the said goods, or any part thereof,—of which the defendants had notice; and that, although the plaintiff had performed all things to entitle him to a performance of the said guarantee, yet the defendants had not fulfilled the contract as aforesaid, or paid the price of the said goods or any part thereof, and the same remained wholly unpaid.

The defendants pleaded,—first, to the first count, never indebted,—secondly, to the first count, that the said goods were bought by the defendants from and were sold and delivered to them by one John William Holderness as the agent and factor of and for the plaintiff, with the plaintiff's privity and consent, in his the said John William Holderness's own name as *the true and sole owner thereof, and as and for his own goods, and that the plaintiff did not appear [*575 nor was he known to the defendants as owner of or interested in the said goods at or before the sale or delivery of the said goods, nor until after the price thereof had become due, nor until after the accruing to the defendants of the debt thereinafter mentioned, and that credit for the said goods and the time thereof was given to the defendants by the said John William Holderness, and not by the plaintiff; that the other causes of action herein pleaded to accrued to the said John William Holderness, and not to the plaintiff, otherwise than through and by means of the said John William Holderness as his agent and factor in respect of and in connection with, and as incidental to, the said sale of the said goods, and not otherwise, and before the plaintiff had appeared or was known to the defendants as the owner of or interested in the said goods; that, before the time of the sale and delivery of the said goods, the defendants had given credit to the said John William Holderness for a large sum of money due and owing from him to them, by drawing upon the said John William Holderness a certain bill of exchange dated the 20th of February, 1858, whereby the defendants required the said John William Holderness to pay them the sum of 600*l.* four months after the date thereof, and which said bill the said John William Holderness accepted but had not paid, although the said bill became due before this suit, and before and at the commencement of this suit was and still remained in the hands of the defendants wholly due and unpaid; that the amount of the said bill exceeded the sum claimed in the first count; and that out of that amount the defendants were ready to set off the sum claimed in the said first count,—thirdly, to the second count, that the defendants did not promise as *alleged,—fourthly, to the second count, that the plaintiff did [*576 not sell or deliver to the said Marmaduke Chaplin the goods therein mentioned, in manner and form as in that count alleged,—fifthly, to the second count, that the price of the said goods never did become

payable from the said Marmaduke Chaplin to the plaintiff, in manner and form as in that count was alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after the last Michaelmas Term. The facts which appeared in evidence were as follows:—In the year 1857, two cargoes of timber were consigned by the plaintiff to one Holderness for sale on a del credere commission, and who had accepted bills drawn upon him on account. Holderness, besides being an importer of timber on his own account, was in the habit of selling as factor for others, and had on two occasions sold timber for the defendants. These sales were usually by public auction, catalogues being issued stating the description and quantities of timber to be sold, but not whose timber it was, having printed at the end of them, "J. W. Holderness & Co., merchants: J. B. Ward, auctioneer." Ward was clerk to Holderness. In May, 1858, the timber in question was put up at one of these sales (a copy of the catalogue containing it being sent to the plaintiff), and bought in. Afterwards, one Marmaduke Chaplin, who had formerly been clerk to Holderness, but was then in business for himself as a broker, entered into a negotiation for the purchase of this timber by private contract, and bought it in the usual way, for cash, payable in a month, less 2½ per cent. discount, without disclosing the name of his principals. Holderness, knowing Chaplin not to be a man of substance, declined to give him a delivery order; whereupon Chaplin offered him Messrs. Norwoods' guarantee, which Holderness accepted. The guarantee was as follows:—

*577] "Hull, June 2d, 1858.

"Messrs. J. W. Holderness & Co.

"Dear Sirs,—In compliance with your request, we beg to state that we are willing to guarantee the fulfilment of the contract for deals and ends made by you with Mr. Chaplin the 31st May last, having given him authority to declare us as principals.

"C. M. Norwood & Co."

Upon the receipt of this letter, Holderness delivered the goods mentioned in the contract to vessels sent by the defendants, and on the 5th of June sent Chaplin an invoice as follows:—

"Hull, 5th June, 1858.

"Mr. M. Chaplin, for his principals.

"Bought of J. W. Holderness & Co.

	£	s.	d.
"796 pieces, 3 × 11, Kjana red (lot 33), 20. 3. 26¾, at 9*l.* 10*s.*	199	4	6
"427 pieces, 3 × 9, Kjana red (lot 34), 9. 1. 17¼, at 9*l.* 10*s.*	89	5	6
"503 pieces, 3 × 7, Kjana red (lot 39), 3. 3. 28¾, at 7*l.* 10*s.*	29	18	2
"Labour	3	8	7
	£321	16	9"

Chaplin knew that the timber was the property of Dresser, the plaintiff, he having applied to him to let him have the sale of it: but the defendants were not aware of that fact. Holderness became bankrupt on the 10th of June. The plaintiff gave notice to the defendants that the timber belonged to him, and demanded the price. The defend-

ants, however, insisted upon their right to set it off against the dishonoured acceptance of Holderness & Co.

The learned judge left three questions to the jury,—first, Did Holderness sell the timber as his own, with the consent of the plaintiff?—secondly, Did the defendants *know that the plaintiff was the owner of the timber?—thirdly, Did Chaplin, the broker for the defendants, know that the timber was the property of the plaintiff? [*578

The jury answered the first two questions in the negative, and the third in the affirmative. His lordship thereupon directed a verdict to be entered for the plaintiff for the amount claimed, 821*l.* 16*s.* 9*d.*, reserving leave to the defendants to move to enter the verdict for them, if the court should be of opinion, upon the above facts, that they were entitled to retain the timber.

Bovill, Q. C., accordingly, in Hilary Term last, obtained a rule nisi to enter a verdict for the defendants, on the ground that upon the facts proved they were entitled to the verdict; or for a new trial on the ground of misdirection or that the verdict was against the evidence with reference to the timber having been intrusted to Holderness for sale on a del credere commission, and possession having been given to him, and advances made by him, and the sale having been in his name. He relied mainly upon a dictum of Cresswell, J., in Fish *v.* Kempton, 7 C. B. 687 (E. C. L. R. vol. 62).

Lush, Q. C., and *J. Brown*, showed cause.—The second plea was not proved. The defendants knew at the time of the purchase that Holderness acted as a factor. *They* did not know whose property the timber was, but Chaplin, their broker, did; and for this purpose they are affected with notice of all that was within *his* knowledge. The decision in Fish *v.* Kempton is in favour of the plaintiff: it was there held, that, if A. buys goods of B., knowing that B. is selling them as factor, he cannot, in an action by the principal for the price, set off a debt due to him from B., although *it is found that A. made the purchase bonâ fide. Wilde, C. J., there says: "Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce and do induce a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another. This I consider to be clear and settled law." Cresswell, J., says: "If a factor sells goods as owner, and the buyer bonâ fide purchases them in the belief that he is dealing with the owner, he may set off a debt due to him from the factor against a demand preferred by the principal,"—referring to Rabone *v.* Williams, 7 T. R. 360(*a*), and George *v.* Clagett, 7 T. R. 359: and he refers to Baring *v.* Corrie, 2 B. & Ald. 137, for the distinction between a broker and a factor in this respect. That is in harmony with all the authorities. [WILLES, J.—Every person who places goods in the hands of a factor for sale gives him authority to sell them in his own name.] Here the buyers knew that Holderness was a factor: and their broker knew to whom the timber belonged. The only question therefore is, whether the [*579

knowledge of the broker was not the knowledge of his principals. Common sense and commercial convenience require that it should be so. To entitle them to set off their debt against the price of the goods, the buyers must show that they bonâ fide believed that the goods were the goods of Holderness. How can that be the case if their broker was aware at the time that the goods were the property of another? The knowledge of the broker negatives the allegation in the plea. In Paley's Principal and Agent 262, it is said, that, "If an agent
*580] *come to the knowledge of a fact while he is concerned for the principal, this operates as constructive notice to the principal himself; for, upon general principles of policy, it must be taken for granted that the principal knows whatever the agent knows. There is no difference between personal and constructive notice, except as to guilt; for, if there were, it would produce great inconvenience, and notice would be avoided in every case by employing an agent. This principle is adopted equally in law and in equity." [ERLE, C. J.—If the fact had come to the knowledge of Chaplin *in the course of the transaction*, no doubt the defendants would be affected with notice.] It is not necessary, in order to affect the principal with notice, that the fact should have come to the knowledge of the agent in the course of the transaction: Hiern *v.* Mill, 13 Ves. 120. [WILLES, J.—The doctrine of courts of law and courts of equity is not quite the same in this respect. In the latter, where one employs an attorney who has acquired a knowledge of something by having acted professionally in another suit, the client is affected by that. ERLE, C. J.—Whatever is in the mind of the attorney, is taken to be known to the client, though it came to the attorney's knowledge while acting professionally for another family.] Common convenience requires that the general knowledge of the broker should be the knowledge of his principal. [WILLES, J.—In Story's Equity Jurisprudence, § 408, it is said: "To constitute constructive notice, it is not indispensable that it should be brought home to the party himself. It is sufficient if it is brought home to the agent, attorney, or counsel of the party; for, in such cases, the law presumes notice in the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter: Com. Dig. *Chancery* (4 C. 5), (4 C. 6); 2 Fonbl. Eq. B. 2,
*581] ch. 6, § 4; *Sheldon *v.* Cox, 2 Eden 224, 228; Jennings *v.* Moore, 2 Vern. 609; Sugden's Vendors, ch. 17; Astor *v.* Wells, 4 Wheat. R. 466. But, in all these cases, notice, to bind the principal, should be notice in the same transaction or negotiation; for, if the agent, attorney, or counsel was employed in the same thing by another person, or in another business or affair, and at another time, since which he may have forgotten the facts, it would be unjust to charge his present principal on account of such a defect of memory: Fitzgerald *v.* Falconberg, Fitzgib. 211. It was significantly observed by Lord Hardwicke, that, if this rule were not adhered to, it would make the titles of purchasers and mortgagees depend altogether upon the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as being less likely to have notice of former transactions:" Warwick *v.* Warwick, 3 Atk. 294; Worsley *v.* The Earl of Scarborough, 3 Atk. 292; Lowther *v.* Carlton, 2 Atk. 242, 392. In the note to this section in the 8th edition, the

learned editor adds: "But notice to a solicitor in one transaction which is closely followed by and connected with another, so as clearly to give rise to a presumption that the prior transaction was present in his mind, and that he could not have forgotten it, is constructive notice to his client. A fortiori, if it is clear, that, at the time of the second transaction, the first was fully in his mind:" citing Hargreaves *v.* Rothwell, 1 Keen 154, and Wythes *v.* Labouchere, 3 De Gex & J. 593. KEATING, J.—In Story on Principal and Agent, § 140, the result of the authorities is stated thus:—"But, unless notice of the facts come to the agent while he is concerned for the principal, and in the course of the very transaction, *or so near before it that the agent must be presumed to recollect it*, it is not notice thereof to the principal; for, otherwise, the agent might have *forgotten it; [*582 and then the principal would be affected by his want of memory at the time of undertaking the agency."] Whatever knowledge the agent has at the time of the transaction, is the knowledge of his principal. [WILLES, J.—Whether he acquires his knowledge in the particular transaction or not?] Yes. The rule is so laid down in Sugden's Vendors and Purchasers, 13th edit. 621, 623, 626, and also in the notes to George *v.* Clagett, in 2 Smith's Leading Cases, 5th edit. 106 et seq. [WILLES, J.—Do you rely upon the guarantee?] Yes. [WILLES, J.—The real consideration for that was the defendants' declaring themselves to be the principals.] No doubt that was the substance of it.

Bovill, Q. C., *Manisty*, Q. C., and *Crompton Hutton*, in support of the rule.—The answer of the jury to the first question put to them merely amounted to this, that the plaintiff did not give Holderness *express* authority to sell the timber in his own name. An implied authority, however, to that effect resulted from his employment to sell on a del credere commission. The defendants were not aware of the fact that Holderness was not the principal. They were therefore entitled to set off their debt against Holderness, according to the rule established in all the cases, from Rabone *v.* Williams, downwards. And, whatever knowledge Chaplin, the broker, may have had from his prior connection with Holderness, the defendants are not affected by that, inasmuch as it was not acquired by Chaplin in the course of the transaction, or while he was acting as the defendants' agent. That is the clear result of all the authorities, however the doctrine of constructive notice may have been strained in courts of equity, many of the cases in which proceed upon the ground of negligence in two parties employing a common agent,—an argument which has no application *here. The doctrine of constructive notice is well illus- [*583 trated by the case of Fuller *v.* Bennett, 2 Hare 394. After the commencement of a treaty for the sale of an estate by A. and the purchase of it by B., A. agreed to give C. a mortgage on the estate as a security for an antecedent debt, and notice of the agreement was given to the solicitor of B. The treaty for the sale afterwards ceased to be prosecuted for upwards of five years, during part of which time the suit of an adverse claimant of the estate was pending. A. then died, and B. purchased the estate at a lower price from the heir and devisee of A. B. conveyed the estate in mortgage to D. The same solicitors were concerned for B. from the commencement of the treaty

with A. until the final purchase of the estate, and for D. in the business of the mortgage. It was held, that, under the circumstances, B. and D. had, through their solicitors, constructive notice of the agreement with C., and that the estate in their hands was subject to the lien of C. for the amount agreed to be secured by the proposed mortgage. Vice-Chancellor Wigram, in giving judgment, says: "The rule that notice to the solicitor will not bind the client, unless it be in the same transaction, or at least during the time of the solicitor's employment in that transaction, I have always understood to be a rule positivi juris, adopted by courts of justice in favour of innocent purchasers; and the reason and policy of the rule appear to me to show that such is the case. 'It is settled,' says Lord Hardwicke, in Worsley v. The Earl of Scarborough, 3 Atk. 392, 'that notice to the agent or counsel who was employed in the thing by another person, or in another business, and at another time, is no notice to his client who employs him afterwards. It would be mischievous if it was so; for, the man of most practice and greatest eminence would then be the most dangerous to employ.' *The expression commonly used in explaining the rule, viz., that the agent may have forgotten the former transaction, points at the same conclusion: and I cannot think that Lord Eldon, in the language he used extrajudicially in Mountford v. Scott, Turn. & Russ. 274, intended to shake the general doctrine which himself as well as Lord Hardwicke and other judges had so often insisted upon: Warwick v. Warwick, 3 Atk. 294; Steed v. Whitaker, Barnard. Ch. R. 220; Hiern v. Mill, 13 Ves. 120; Mountford v. Scott, 3 Madd. 34; Kennedy v. Green, 3 Mylne & K. 699. It is not necessary so to understand Lord Eldon's language, when construed with reference to the circumstances of the case before him. The rule limited as above, is, I presume to say, best adapted to, and fully sufficient for, the purposes of justice." In the notes to the case of Le Neve v. Le Neve (1 Ves. 64), in Tudor's Leading Cases in Equity, Vol. 2, p. 49, it is stated as the result of the authorities in equity, that "notice to counsel, agents, or solicitors, must, in order to affect their employer, have been given or imparted to them in the transaction." And the learned annotator cites amongst other authorities Warwick v. Warwick, 3 Atk. 294, where Lord Hardwicke, referring to Fitzgerald v. Falconberg, Fitzgib. 211, where it was held that the notice should be in the same transaction, says,—"This rule ought to be adhered to; otherwise, it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions." Again,—referring to Kennedy v. Green, 3 Mylne & K. 699, —it is said: "Where a solicitor, employed both by the mortgagor and mortgagee, was himself the author of a fraud, Lord Brougham, differing in this respect from the opinion of Sir *John Leach, M. R., held, that, although the solicitor had actual and full notice of his own fraud, the mortgagee was not cognisant in law and constructively merely because his solicitor, himself the contriver, the actor, and gainer of the transaction, knew it well." In Wilde v. Gibson, 1 House of Lords Cases 605, 623,—where it was held, that, to set aside a purchase perfected by conveyance and payment of the

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purchase-money, for fraudulent concealment by the vendor of a defect in the title, where there was no warranty or statement that there was no defect, proof of concealment by *the vendor's agent* is not sufficient, there must be proof of direct personal knowledge and concealment by the principal,—Lord Campbell says: "The effect of constructive notice in cases where it is applicable, as in contests between equities of innocent parties, is sufficiently severe, and is only resorted to for the necessity of finding some ground for giving preference to equities otherwise equal: but this is the first time I ever knew it applied in support of an imputation of direct personal fraud and misrepresentation. The two things cannot exist together: there can be no direct personal fraud without intention; and there can be no intention without knowledge of the fact concealed or misrepresented: and, if there be knowledge, the case of constructive notice cannot arise; it would be absorbed in the proof of knowledge." [WILLES, J.—That proceeds upon a ground on which the Court of Chancery decidedly differs from our courts. The doctrine of constructive notice arising out of the knowledge acquired in the relation between attorney and client, is altogether foreign from transactions between principal and agent in commercial affairs.]

ERLE, C. J.—This is a rule which calls upon the plaintiff to show cause why a verdict should not be *entered for the defendants on a plea of set-off to a declaration for goods sold and delivered. [*586 The plea in substance states that the goods were bought by the defendants from one Holderness and were sold to them by Holderness, as the agent and factor of the plaintiff, with the plaintiff's privity and consent, in his (Holderness's) own name as the true and sole owner thereof, and as and for his own goods; that the plaintiff was not known to the defendants as the owner of or interested in the goods at or before the sale nor until after the price thereof had become due and payable, nor until after the accruing of the defendants' debt thereinafter mentioned, and that credit for the said goods was given to the defendants by Holderness and not by the plaintiff; that, before such sale and delivery, Holderness was indebted to the defendants in a sum exceeding the price of the said goods; and that out of that debt they were ready to set off the sum claimed in this action. I am of opinion that the rule must be made absolute, because, in the first place, the goods were placed in the possession of Holderness for sale under a del credere commission, and I am of opinion that it is clear that the plaintiff must be taken to have authorized Holderness to sell them, as factor, in his own name, and as if they were his own goods. They were intrusted to him in his capacity of factor, as between merchant and factor, to sell on a del credere commission, and after an advance made by him upon them by bill. It is clear, therefore, that Holderness was authorized to sell the goods in his own name and as if they were his own property. The next step for the defendants to make out, was, that they bought the goods in ignorance of the plaintiff's interest in them. The evidence shows, I think, that the defendants did bonâ fide believe the goods to be the goods of Holderness, and not the property of the *plaintiff. It appears that the [*587 defendants employed one Chaplin, a broker, to buy the goods for them, and that Chaplin, at the time he bought them, had in his

mind a knowledge of the fact that the goods were the property of the plaintiff, and not of Holderness. It stands as an uncontroverted fact in the case, that the knowledge of Chaplin that the goods were the property of the plaintiff came to him before he was employed as the agent of the defendants, and entirely distinct from that employment, and whilst he was in the service of Holderness. Before he stood in any relation to the defendants, Chaplin, knowing the timber to be the property of the plaintiff, he having then left the service of Holderness and commenced business as a broker on his own account, applied to the plaintiff to be allowed to sell it for him. No information as to the ownership of the goods ever came to Chaplin in the course of the transaction between him and the defendants and Holderness, though I will assume that Chaplin was perfectly aware of the fact of the timber being the property of the plaintiff. Under these circumstances, I am of opinion that the rights of the defendants are not affected by anything which came to the knowledge of Chaplin before he became the agent of the defendants. The general rule, I apprehend, is, that, whatever an agent does within the scope of his employment, and whatever information comes to him in the course of his employment as agent, binds his principal. Where an agent is employed to make a purchase, the principal is affected by all the knowledge acquired by the agent which would have affected the principal if he had conducted the transaction himself. Anything which comes to the knowledge of the agent in the course of the transaction binds his principal: but the principal is not bound by any knowledge previously possessed by the *588] agent, and which *may or may not be in his memory at the time he is acting for him. If the defendants had employed a broker who was a stranger to the dealings between the plaintiff and Holderness, it is quite clear that they would have had a right to make this set-off. Why should they be placed in a different position because they have employed a broker who had acquired certain knowledge from the fact of his having formerly been in the service of the seller of the goods? It would be very dangerous to lay down any such doctrine, and would make the rights of parties depend upon an accident. A broker necessarily acquires a great number of pieces of information in the course of casual communication with others. It would to my mind lead to most pernicious consequences if transactions conducted through a broker were to be validated or invalidated according as a jury might find that something which had at some time been told to him was or was not in his memory at the time of making the contract. The cases in equity are well distinguished on a ground which will be better explained by my Brother Willes than I can pretend to explain it. The case of Fuller *v.* Bennett, 2 Hare 394, and the authorities referred to in 2 Tudor's Leading Cases in Equity 49, 53, appear to me to lay down the doctrine to the effect that I have imperfectly stated it, viz., that the knowledge of the agent acquired in the course of the particular transaction, and in reference to the transaction in which he is acting as agent, binds the principal, but that the latter is not bound by anything which was or might be in the mind of the agent before the commencement of the relation between them.

WILLES, J.—I am of the same opinion. I apprehend it to be the general rule of law, that where a contract is made by an agent for an

undisclosed principal, the *principal may enforce performance of it, subject to this qualification, that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal, and consequently he is to have the same right of set-off which he would have had against the agent. That is peculiarly so in the case of factors, because in the ordinary course of dealing the transaction appears to be a dealing with the factor as principal. If the defendants, instead of employing a broker, had gone themselves to Holderness and made the purchase, they would have been dealing with him as principal, and would have had an undoubted right to set off their claim against him, and the principal of Holderness would have been obliged to allow all equities as between them. It would be very unjust if it were not so. It is clear that Holderness was intrusted with the possession of the goods as factor, and that he had a right to sell them in his own name. He did sell them in his own name and as his own goods; and the defendants, through their broker, bought them, having no notice that the goods were not the property of Holderness. The defendants, therefore, were entitled to set off the debt due to them from Holderness, unless there is something exceptional in the transaction to deprive them of that right. If the defendants knew at the time that the goods were the plaintiff's, they would not be entitled to the set-off. It is clear that they did not know it: but it is said that indirectly they had notice of the fact, because the broker they employed knew to whom the goods belonged. Does the knowledge of Chaplin bind the defendants? Clearly not. The defendants employed Chaplin as broker to buy the timber for them, but not to rake up his memory of all former transactions in which he might have been engaged. This is not a case of fraud. I am far from *saying that if there had been any fraud practised by Chaplin in the matter, the defendants could obtain the benefit of a contract obtained by such means. But this is not a case of that sort. It is said, and numerous cases in equity have been referred to in support of the position, that one who purchases an estate without notice of previously-existing equitable interests, is nevertheless bound by any such of which his attorney has notice, though he may have received such notice through his employment as solicitor in a former matter, and even while acting for another client. I must confess I feel very little inclined to follow the footsteps of the court of equity in this respect. But I am of opinion that there is no analogy whatever between those cases and the present; because there the attorney who has notice of the existence of a prior equitable interest, and does not impart the information to his client, commits a positive wrong towards the party having such interest. How does that apply here? Chaplin is employed by the defendants to buy certain timber for them. He commits no fraud and affects nobody's interest by abstaining from communicating to his employers a fact which had come to his knowledge long before the relation of principal and agent was created between them. That is a decided and a substantial distinction between the cases in equity and transactions of this description on the market. I am not disposed to depart from the general rule acted upon in our courts, that the acts of one man are not to affect the interests of another who does not authorize them:

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and the same rule is applicable to knowledge,—always excepting the case of fraud, as to which I reserve my opinion until circumstances arise which may call for an expression of it. With respect to the second count, it is clear that the document is misrepresented. It is
*591] not a guarantee for the debt *of a third person, but a mere acknowledgment on the part of the defendants that they are liable as principals.

KEATING, J.(a)—I entirely concur with the rest of the court. Upon the simplest principles which govern the relations of principal and agent, one who employs an agent invests him with authority to do everything that is necessary to the performance of the duty intrusted to him, and is affected with notice of all information acquired by him in the course of the transaction, as if the principal were transacting it himself. But there is no authority for saying that the doctrine of constructive notice is to be carried beyond this in a court of law. Here, the jury have found that the defendants did not know that the goods which Chaplin was buying for them were not the property of Holderness; but that Chaplin knew that they were the plaintiff's goods. By employing Chaplin to effect the purchase for them, they authorized him to affect them with notice of anything acquired by him in the course of that agency, but not with his memory of facts the knowledge of which was acquired by him in the course of another employment. Rule absolute accordingly

(a) Byles, J., was absent.

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*592] *ROBERTS v. WATKINS. *May* 26.

Under a builder's contract, certain instalments were to be paid as the work progressed, and the balance within two calendar months after the completion of the contract, "provided the architect should have *certified* that the whole of the work had been done to his satisfaction:"—Held, that it was not necessary that the architect should certify *in writing*.

THIS was an action upon a builder's contract, whereby the defendant engaged to pay certain instalments as the work progressed, and the balance at the expiration of two calendar months, provided that the architect (one Lavender) "shall have certified that the whole of the work has been done to his satisfaction."

At the trial before Erle, C. J., at the sittings at Westminster after last Term, it appearing that, although the defendant had taken possession of the premises, and the architect had intimated that all the work had been properly done under the contract, he had not given a certificate to that effect *in writing*, it was insisted that the plaintiff was not entitled to recover.

His Lordship was of opinion (referring to the case of Munro *v.* Butt, 8 Ellis & B. 738 (E. C. L. R. vol. 92),) that the taking possession of the house dispensed with a certificate; and he ruled, that, at all events, a certificate *in writing* was not necessary, and left it to the the jury to say whether there had been an oral intimation of satisfaction.

The jury having returned a verdict for the plaintiff,

Lush, Q. C., moved for a new trial on the ground of misdirection

and that the verdict was against evidence. He submitted, that, although the contract did not in terms say that Lavender's certificate should be in writing, the intention of the parties, which was that the defendant should have the security of a document which could not mislead or be contradicted, could not be carried into effect by anything short of a certificate in writing. The terms of the contract in Munro *v.* Butt were widely different from those here; *and the judgment proceeds upon a totally distinct ground. [BYLES, J.—The words are not, "shall give a certificate," but merely, "shall certify," that is, "signify" his satisfaction.] In Morgan *v.* Birnie, 9 Bingh. 672 (E. C. L. R. vol. 23), 3 M. & Scott 76, the defendant was to pay for a certain building upon receiving an architect's certificate that the work was done to his satisfaction: the architect checked the builder's charges and sent them to the defendant: and it was held that this did not amount to such a certificate of satisfaction as to enable the builder to sue the defendant, although he had not objected to pay on the ground that no sufficient certificate had been tendered. In giving judgment, Tindal, C. J., there says: "The *production* of a certificate from Mr. Clayton was a condition precedent to the bringing this action." It is clear, therefore, that the court thought a *written* certificate necessary. Whether the phrase used is, "shall certify," or "shall give a certificate," the meaning is the same. [BYLES, J.—When the Recorder of London certifies to the court the customs of the city, it is done ore tenus. ERLE, C. J.—The court is made certain of the custom by the mouth of the principal officer of the corporation.] That is by reason of an exceptional privilege. But it would be dangerous to hold, that, where the parties have stipulated that a certain condition shall precede the right of the one to call upon the other to make a payment, its performance shall be left to the uncertainty of oral and possibly conflicting testimony. It is submitted that his Lordship was wrong in telling the jury that the contract did not in point of law require a certificate from the architect in writing. [*593

WILLIAMS, J.—I am of opinion that there should be no rule in this case. This is an application for a new trial upon two grounds,—first, that the Lord Chief *Justice misdirected the jury, inasmuch as he told them, that, in his opinion, it was not necessary to the plaintiff's right to maintain the action, that there should have been a certificate of the architect in writing that the work was done to his satisfaction. The jury found that there was a certificate to that effect by word of mouth. It is highly probable that the person who framed this contract intended that the certificate of the architect should be given in writing: but the question is whether the terms he has used express such an intention. I am of opinion that they do not. There is nothing to make it a condition precedent to the builder's right to enforce payment of the stipulated sum, that the certificate that the work has been done to his satisfaction should be in writing. The words are "provided that the architect shall have certified that the whole of the work has been done to his satisfaction." There is nothing to make it requisite that this should be done by any writing, though it is usual to give the certificate in writing, and in most cases it is required to be in writing. But I know of no rule of law which prevents the architect's satisfaction being certified by word of mouth [*594

To hold that a written certificate was necessary here, would be importing into the contract a term which is not found there. Morgan v. Birnie, 9 Bingh. 672, 3 M. & Scott 76, has been relied on. But, in the first place, the language of the agreement there was different: and, in the next place, it is to be observed that the decision did not turn upon the deficiency of writing, but on the fact that the architect had failed to signify his satisfaction with the work at all. Some analogy may be derived from the case of awards, which it is usual to stipulate shall be in writing, but which, nevertheless, will, in the absence of such a stipulation, be perfectly good if made by word of
*595] mouth: Russell on Awards, 2d edit., 242. Oates v. *Bromil, 1 Salk. 75.(a) The ruling of my Lord, therefore, was quite correct. As to the other ground of the motion, it is enough to say that my Lord was not dissatisfied with the verdict, and that we see no ground for interfering.

WILLES, J.—I am of the same opinion.

BYLES, J.—The complaint against the direction of the Lord Chief Justice is, that he told the jury that the words of this contract, "shall have certified that the whole of the work has been done to his satisfaction," did not require a formal certificate in writing. The natural and ordinary meaning of the verb "to certify," is, to give information or assurance. If it necessarily imported that this should be done in writing, as Mr. Lush has contended, the words "in writing," which are commonly found in these instruments, are otiose. There are many things which may equally well be done by word of mouth, in the absence of a stipulation that they shall be done in writing. As to the evidence, it must be a very strong case to induce us to interfere, unless the judge who presided at the trial certifies that he is dissatisfied with the verdict. Rule refused.

(a) "Debt on a bond conditioned to perform an award, ita quod it be made and ready to be delivered by such a day; defendant pleaded no award: plaintiff replied a parol award, and avers it was made and ready to be delivered by such a day. Defendant demurred. Salkeld, for the plaintiff, insisted a parol award was deliverable; for, a man is said to deliver a message as well as a letter, and that there is an oral as well as a manual tradition; and, as a parol award is capable of delivery, so it is ready to be delivered from the time it is agreed upon: Dyer 218; 3 Bulstr. 34; Co. Ent. 128. And, notwithstanding Serjt. Broderick on the other side urged importunately, and cited a late case in C. B., as he said, in point, the court, on consideration, gave judgment pro quer."

*596] *WILLIAMS v. GEORGE SMITH, ANN CASSE, and JOHN WILLIAMS CASSE. *June* 2.

Upon a change of solicitors in certain suits in equity, an order was made by the Master of the Rolls requiring the former solicitor to hand over to the newly-appointed solicitor all papers and documents in his possession, custody, or power relating to the suits. Some of the papers were in the hands of counsel, and others in the hands of a law-stationer, who respectively claimed liens thereon for their fees and charges; and the solicitor, alleging that his client had undertaken to provide funds for fees and disbursements, but had failed to do so, was consequently unable to comply with the order as to those papers.

The newly-appointed solicitor, upon an affidavit alleging the neglect to obey the order, but not mentioning the excuse set up, obtained from the clerk of the records and writs a writ of attachment, under which the former solicitor (already in custody for debt) was detained. An application having been fruitlessly made to the Master of the Rolls to set aside the attachment, upon a statement of all the facts, the former solicitor appealed to the Lords Justices, who revers-

ed the decision of the Master of the Rolls, with costs, and ordered the writ to be set aside, and the solicitor discharged from custody:—

Held, that neither the solicitor who so sued out the attachment nor the client was liable in trespass.

THIS was an action for false imprisonment.

The first count of the declaration stated, that, before and at the time of the committing of the grievances thereinafter mentioned, to wit, on the 14th of July, 1860, an order was made by the High Court of Chancery, to wit, the Master of the Rolls, that the plaintiff should deliver up on oath, within four days after service of the said order upon him, all deeds, briefs, papers, documents, and writings then in his possession, custody, or power relating to certain causes and suits and a certain matter therein referred to, unto the defendant George Smith, to be held by him on the terms contained in the letters of the said defendant George Smith in the petition therein referred to set forth: yet that the defendants afterwards, by falsely and maliciously, and without any reasonable or probable cause, stating and representing, to wit, to the said Court of Chancery, to wit, to the said Master of the Rolls, by a malicious affidavit of the said George Smith and one James Radgrove, that the now plaintiff had not, after due service of the said order upon him, delivered up on oath, within four days after service of the said order, or since, all deeds, briefs, papers, documents, and writings then in his possession, custody, or power of or *relating to the said causes or suits and matters referred to and [*597 mentioned in the said order, unto the defendant George Smith, to be held by him upon the terms aforesaid; but had wholly refused or neglected to obey the said order according to the exigency thereof; whereas, in truth, as the defendants well knew at the time of the making of the said representation, the plaintiff had, before the making of such representation and affidavit, duly tendered to the defendant George Smith all the aforesaid deeds, briefs, papers, documents, and writings, and the said George Smith had refused to accept or receive the same,—caused and procured to be issued out of the Court of Chancery a writ of attachment, directed to the sheriff of Middlesex, whereby the said sheriff was directed to attach the now plaintiff, so as to have him before our Lady the Queen in her said Court of Chancery wheresoever the said court should then be, to answer our said Lady the Queen touching a certain contempt which the plaintiff, it was alleged, had committed against our said Lady the Queen, as also such other matters as should be then and there laid to his charge, and further to perform and abide such order as the Court of Chancery should make in that behalf: That the defendants caused the said writ to be endorsed according to the practice of the said court in manner following, that is to say,—"By the Court. For breach of an order dated the 14th of July, 1860, made in the matter of John Williams, one of the solicitors of this court, in not delivering up on oath all deeds, briefs, papers, documents, and writings now in his possession or power, of or relating to the said causes or suits and other matters, unto the said George Smith, the petitioners' present solicitor, to be held by him on the terms contained in the letters of the said George Smith in the petition set forth, as by the said order the within-

*598] named John Williams was *commanded:" That the defendants afterwards falsely and maliciously caused the said writ, so endorsed as aforesaid, to be delivered to the said sheriffs to be executed in due form of law: That the said sheriffs afterwards by virtue of the said writ, within their bailiwick, took and arrested the plaintiff by his body, and conveyed him to gaol, and there detained him in prison, under the said writ, for a long time, until the plaintiff applied to the Court of Chancery, to wit, the Lords Justices, to be discharged out of the said custody, on the ground that he had duly complied with the said order; and such proceedings were thereupon had in the matter of the said application in relation to the said order, that afterwards, by an order duly made by the said Court of Chancery, to wit, by the said Lords Justices, it was ordered that the said attachment should be set aside, and that the plaintiff should be discharged out of the custody of the said sheriff, to wit, on the ground that he had duly complied with the said order; and by reason of the premises the plaintiff was unjustly deprived of his liberty for a long time, to wit, seven months, and suffered pain of body and mind, and was prevented from transacting his affairs and business, and from the practice of his profession as an attorney, and was injured in his credit, and incurred expense in applying to the said Master of the Rolls and the Lords Justices for his discharge from the said imprisonment, and incurred expense otherwise in and about obtaining his release from the said imprisonment; and that before suit all things existed and had happened necessary to entitle him to maintain this action.

The second count alleged that the defendants assaulted the plaintiff and imprisoned him and kept him in prison for a long time, to wit, seven months, whereby the plaintiff was injured and damnified as in the first count mentioned. Claim, 3000*l.*

*599] *The defendant Smith pleaded,—first, not guilty,—secondly, to the second count of the declaration, that, before and at the time of the committing the acts complained of in the said second count, to wit, on the 14th of July, 1860, an order was duly made by the High Court of Chancery, by the Master of the Rolls, that the plaintiff should deliver up on oath, within four days after service of the said order upon him, all deeds, briefs, papers, documents, and writings then in his possession, custody, or power relating to certain causes and suits and a certain matter therein referred to, unto the defendant George Smith, to be held by him on the terms contained in the letters of the said defendant George Smith therein referred to set forth, and the plaintiff did not obey or comply with the said order, and refused or neglected to obey it; and the said Ann Casse and John Williams Casse, being parties to the suits pending in the said Court of Chancery and in which the said order was made, and the said George Smith being and acting as their solicitor in the said suits, and they having procured and obtained the said order, before the committing of the said acts complained of in the said second count, procured to be issued out of the said Court of Chancery a writ of attachment directed to the sheriff of Middlesex, whereby the said sheriff was commanded to attach the now plaintiff so as to have him before our Lady the Queen in her said Court of Chancery, wheresoever the said court should then be, to answer our said Lady the Queen touching a certain contempt

which the now plaintiff, it was alleged, had committed against our said Lady the Queen, being the said contempt in disobeying the said order, as also such other matters as should be then and there laid to his charge, and further to perform and abide such order as the said Court of Chancery should make in that behalf; and that the *defendants caused the said writ to be endorsed according to the [*600 practice of the said court, stating therein that the said writ was made by the court for the breach of the said order dated the 14th of July, 1860; and that the defendants caused the said writ, so endorsed as aforesaid, to be delivered to the said sheriff to be executed in due form of law; and that afterwards the said sheriff, under and by virtue of the said writ, within his bailiwick, attached and took and arrested the plaintiff by his body, and the said sheriff imprisoned the plaintiff and kept him in prison under and in execution of the said writ according to the exigency thereof, which were the acts complained of in the said second count.

The plaintiff joined issue on the above pleas of the defendant Smith; and for a further replication to the second plea, said, that after the said writ of attachment had issued, and before any of the acts in the second count mentioned, the said writ of attachment was by competent authority in that behalf, to wit, by rule or order of the said Court of Chancery then and there duly made, to wit, by the Lords Justices, discharged, annulled, set aside, and wholly abrogated, quashed, and rendered inoperative, *for irregularity*, to wit, upon the ground that the same had been obtained by and through the means of deceit and falsehood practised upon the said court, to wit, by means of a false and fraudulent affidavit, and a false and fraudulent statement and suppression therein, and which affidavit was made and filed in the said court on or about the 8th of May, 1860, by one George Smith:

And the plaintiff further said that he sued not only for the trespasses attempted to be justified by the said second plea, but for other trespasses committed as in the declaration mentioned, to wit, by detaining the plaintiff in custody after the said attachment had been set aside.

*The defendant Smith took issue on the second replication [*601 to his second plea, and pleaded not guilty to the new assignment.

The defendant Ann Casse pleaded similar pleas, to which there was a similar replication and new-assignment. And the defendant John Williams Casse appeared in person, and pleaded not guilty.

The cause was tried before Byles, J., at the sittings in London after the last term, when the material facts which appeared in evidence were as follows:—The plaintiff, a solicitor, was in the month of December, 1859, retained by Mrs. Casse and her son as their solicitor in two suits in Chancery, of Bayley *v.* Casse and Casse *v.* Bayley, and in other matters,—Mrs. Casse, as the plaintiff swore (but which was denied by her), undertaking from time to time to supply the necessary funds. On the 10th of May, 1860, the plaintiff was arrested by the sheriff of Middlesex for a debt of 200*l.*, and carried to White Cross Street Prison. Upon this fact coming to the knowledge of Mrs. Casse, she appointed the defendant Smith to act as her solicitor in lieu of the plaintiff: and, after repeated requisitions to the plaintiff

to deliver up the papers in the suits to Smith, an application for an order upon him to that effect was made to the Master of the Rolls. This application was supported by an affidavit by Mrs. Casse and also an affidavit by Mr. Smith. The latter affidavit was as follows:—

"1. That, on the 10th day of May last, the above-named John Williams was arrested by the sheriff of Middlesex for debt, and he has since been and now is a prisoner for debt in the debtors' prison for the county of Middlesex.

"2. That, on the 18th day of June, 1860, I wrote, signed, and sent to the said John Williams a letter of that date, which was received by him, and which letter, *except as to the formal parts, is in the words following,—'*Bayley* v. *Casse*. *Casse* v. *Bayley*. *Re Philp*. You have already seen by the copies of the three orders served upon you in these causes and matter, that I was appointed as the solicitor for Mrs. Casse and her son in your stead. Mrs. Casse and her son were placed in such difficulty and peril by the loss of your professional assistance through your imprisonment, that they had no alternative but seeking other professional aid, yet delayed it to the latest moment, relying on your statement that you should obtain your release either on Saturday the 26th or Monday the 28th ult. My clients, under the circumstances, are entitled to require of you the immediate delivery to me of all the documents and papers in your hands relating to these suits and matter, to enable me to prosecute and defend the same and protect their interests therein: and, as such documents and papers are daily required, I must beg of you at once to give attention to my request, made on the instructions of my clients, and make an appointment when and where I can receive the papers, —I hereby offering to hold the same subject to any lien you may have thereon:'

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"3. That, the said John Williams not having made any answer, or otherwise in any manner noticing my said letter, I, on the 21st day of the same month of June, wrote, signed, and sent to the said John Williams another letter of that date, and which was received by him, and which last-mentioned letter, except as to formal parts, is in the words following:—'*Bayley* v. *Casse*. *Casse* v. *Bayley*. *Re Philp*. I beg to refer you to my letter of the 18th instant, to which I have received no reply. The documents and papers in your hands in and relating to these suits and matter are immediately required, the causes being at issue, and the time running on within which my clients must *go into evidence; and without the papers I am unable to get advised thereon. In the above matter, an appointment stands for the 27th instant for the taxation of Mr. Philp's bill of costs.(a) In my letter of the 18th instant, I undertook on the receipt of the papers to protect your lien thereon, and to hold the paper subject thereto. I now beg to repeat such undertaking: and, in conclusion, I must add, that, unless I receive the papers in the course of the present week, I shall be under the necessity of presenting one or more petitions on behalf of my clients, to enforce the delivery of the papers to me on the terms contained in this and my former letter, by which petition or petitions I shall seek from you personally the costs of and occasioned by such applications.'

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(a) Philp had been Mrs. Casse's former solicitor in the Chancery suits.

"4. That the said John Williams has not replied to my said last-mentioned letter, or in any other manner taken any notice thereof:

"5. That the statements contained in my said letters as to the state and position of the said causes and matter referred to by my said letters, are true in substance and fact: and, unless the deeds, briefs, papers, and documents so in the hands of the said John Williams are delivered to me, I shall be unable to proceed with, prosecute, and defend the said causes, suits, and matter."

The plaintiff's affidavit in answer stated that he had only consented to act as solicitor for the Casses upon Mrs. Casse's undertaking to supply him with funds to meet disbursements for counsel's fees, stationer's charges, &c., and that, although his liability for these exceeded 360*l.*, she had only supplied him from time to time with trifling sums amounting in the whole to 56*l.* 15*s.* 6*d.*

*The petition came on before the Master of the Rolls on the 14th of July, 1860, an order (which recited the affidavits of Mrs. Casse and Mr. Smith) was made that the plaintiff should deliver up on oath, within four days after service of the said order upon him, all deeds, briefs, papers, documents, and writings then in his possession, custody, or power relating to the causes and suits and matter above referred to, unto Mr. George Smith, to be held by him on the terms contained in the letters of the said George Smith in the petition therein referred to and set forth. [*604

This order was served upon the plaintiff on the 26th of July; and on the 3d of August the plaintiff filed an affidavit with three schedules of documents annexed thereto, of which affidavit the following is a copy:—

"1. That the first schedule hereto contains a list of all deeds, briefs, papers, documents, and writings now in my possession, custody, or power of or relating to the causes or suits and matter referred to in the order made in the above matter by His Honour the Master of the Rolls on the 14th of July, 1860:

"2. That the second schedule hereto contains a list of briefs and documents which I believe to be now in the possession of Mr. L. and Mr. E. L. respectively as counsel engaged on behalf of the petitioners mentioned in the said order, which briefs and documents the said Mr. L. and Mr. E. L. respectively decline to give up, *as they claim a lien thereon for their fees as such counsel in the causes and matter to which they refer;* and I am unable to obtain the same:

"3. That the third schedule hereto contains a list of briefs and documents relating to the said causes, suits, and matter, and which I believe to be now in the possession of Mr. Arthur Osmond, law-stationer, 29, Ironmonger Lane, Cheapside, *who claims a lien thereon *for his charges for copying the said documents, briefs, and papers,* for the purposes of the causes and matters to which they refer.' [*605

The plaintiff's attorney's managing-clerk attended at the office of Mr. Smith on the 3d of August with a copy of the last-mentioned affidavit and schedules, and tendered the documents and papers mentioned in the first schedule. Smith's clerk at that time, and Smith himself afterwards, declined to receive the papers tendered, insisting that the plaintiff was bound to deliver up *all:* and on the 8th of August an attach-

ment issued against the plaintiff for disobedience of the order of the 14th of July. The attachment issued on the joint affidavit of Mr. Smith and of one James Redgrave, his clerk, as follows:—

"1. I the said James Redgrave for myself say, that I did on the 26th day of July, 1860, personally serve the above-named John Williams with an order made in this matter by the Right Hon. the Master of the Rolls, bearing date the 14th day of July, 1860, whereby it was ordered that the said John Williams 'do deliver up on oath, within four days after service of this order, all deeds, briefs, papers, documents, and writings now in his possession, custody, or power, of or relating to the said causes or suits and matter, unto the said George Smith, the petitioners' present solicitor, to be held by him on the terms contained in the letters of the said George Smith in the petition set forth,' by delivering to and leaving with the said John Williams a true copy of the said order, and at the same time producing and showing to him the said original order, duly passed and entered; on which copy, when so served as aforesaid, was endorsed a memorandum in the words following,—'If you the within-named John Williams neglect to obey this order by the time therein limited, you will be liable to be arrested
*606] under *a writ of attachment issued out of the High Court of Chancery, or by the serjeant-at-arms attending the same court, and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order:'

"2. And I the said George Smith for myself say that the said John Williams hath not delivered up on oath within four days after service of the above-mentioned order of the 14th day of July, 1860, or since, all deeds, briefs, papers, documents, and writings then in his possession, custody, or power, of or relating to the said causes or suits and matter referred to and mentioned in the said order, unto me the said George Smith, the petitioners' present solicitor, to be held by me on the terms contained in the said letters of me the said George Smith in the petition in the said order referred to set forth, but hath wholly refused or neglected to obey the said order, according to the exigency thereof."

On the 27th of September, 1860, the plaintiff addressed the following letter to Mrs. Casse:—

"Hick's Hotel, Cripplegate,
27th September, 1860.

"Madam,—I deem it unjust and inhuman in you to detain me here, when I have done everything that laid in my power to comply with the order of the Master of the Rolls by delivery over to your present solicitor all papers of yours in my possession or power. But I am also detained on your account for the stationer's charges, while your engagement to me was that you would supply funds in the prosecution of your suits, as they were required. I have by every means endeavoured to get back from Mr. L. what briefs and papers were left with him; but he withholds them until he is paid his fees. You know
*607] what *promises you made to him. To facilitate your going into evidence during the vacation, I forwarded to my solicitor, to be handed over to yours, every document I had connected with your suits and matters. I could do no more; and they were by him tendered, which, I submit, were alone sufficient and ample for that purpose.

We are now within a month of the term; and, without acquiescing in the order which the Master of the Rolls made so hastily upon your petition just before rising for the vacation, I am still desirous in every way to aid and assist you so far as furnishing papers, and to enable you to go into evidence,—a task that will occupy the interval between this and the term, from the great length of the answers, notwithstanding the dilemma I have been brought to through you. I write to you direct, determined never to hold any further communication with your solicitor. If you persist in following up this persecution (for, as to the stationer's demand, I trust you will furnish me forthwith with the means of discharging), I must be obliged to bring all the facts before a vacation judge, or apply for a habeas corpus. It is monstrous I should thus suffer on account of Mr. L. (your counsel), of whom I knew nothing until introduced by yourself. Yesterday he forwarded to me his ultimatum, that if as to any other matter I might be discharged, he would withhold, nevertheless, all papers belonging to you in his possession until he was paid his fees."

In the following Michaelmas Term, the plaintiff applied to the Master of the Rolls to set aside the attachment, on the ground that the tender of the documents and papers comprised in the first schedule annexed to the plaintiff's affidavit of the 3d of August was a substantial compliance with the order of the 14th of July. The application was opposed by Smith, and the Master of the Rolls declined to make any *order; the effect of which was to dismiss the application, with costs. [*608

The plaintiff then appealed to the Lords Justices, who decided that the plaintiff had in spirit complied with the order of the 14th of July, 1860, by tendering the documents and papers mentioned in the first schedule to the affidavit filed on the 3d of August, and that those mentioned in the second and third schedules could not properly be considered as being in his possession, custody, or power, and that, if Mrs. Casse required them for the purpose of the suits, she must advance the funds necessary to obtain them; and they ordered the attachment to be set aside, with costs, and that the plaintiff be forthwith discharged from custody: and, by consent, it was made part of the order, that Mrs. Casse should be at liberty, upon indemnifying the plaintiff against costs, to bring an action for the papers in his name: see Re Williams, 30 Law J., Ch. 610.

The papers and documents contained in the first schedule were thereupon handed over to Smith, and the plaintiff was discharged as to the attachment, though still detained in execution at the suit of other creditors. He was ultimately discharged under the Bankruptcy Act, 1861, on the 28th of April, 1862.

Smith applied to the Lords Justices to make it part of their order, setting aside the attachment, that the plaintiff should bring no action; but this application they declined to entertain.

The plaintiff swore at the trial that when he was first appointed to act as solicitor for the Casses, it was arranged that advances were to be made to him for counsel's fees and other necessary disbursements. He also swore, that, but for the attachment, he could have settled with all his detaining creditors.

*609] *Pigott*, Serjt., for Mrs. Casse, and *Parry*, Serjt., for *Smith.—it being conceded that there was no evidence against the other defendant, John Williams Casse,—respectively submitted that there was no evidence of malice or the absence of reasonable or probable cause, that there was no evidence of a joint trespass, that Mrs. Casse was not responsible for the act of Smith, and that Smith was not liable for putting in force the order of the Master of the Rolls.

For the plaintiff it was insisted, that the issuing of the attachment was clearly malicious, the order of the Master of the Rolls of the 14th of July, 1860, being merely for the delivery up to Smith of such papers and documents as were in the custody, possession, or power of the plaintiff; and that Smith had no right to assume to himself to decide that the plaintiff had under the circumstances disobeyed that order, but should have applied to the Master of the Rolls upon a statement of all the facts.

The learned judge intimated that he should reserve the defendants leave to move, but it must be on the understanding that the jury were to find damages as against the defendant Smith singly and as against the two together.

Smith swore, that, prior to the application for the attachment, he consulted counsel as to Mr. L.'s right to detain the papers for his fees, and as to whether the offer by the plaintiff to deliver up the papers in his actual possession was a compliance with the order of the Master of the Rolls, and that he issued the attachment in pursuance of the advice he received.

In his summing-up, the learned judge said, that, as to the first count, he was of opinion that there was no evidence of malice or want of reasonable or probable cause; but that, as to the count for the assault and false imprisonment, Smith at all events was without defence, and

*610] it was simply a question of damages: *that, as to Mrs. Casse, the question was whether she originally authorized the detention of the plaintiff in prison or ratified it subsequently; and that the mere relation of attorney and client did not make the client liable. He then referred to the plaintiff's letter to Mrs. Casse of the 27th of September, 1860, and observed that if she had ordered Mr. Smith to discharge the plaintiff, he must have done so. He also remarked upon the fact, that, though the order of the Master of the Rolls of the 14th of July, 1860, recited an affidavit of Mrs. Casse, none had been produced in evidence: and he left it to the jury to say whether or not Mrs. Casse was liable. The jury found that she was.

His Lordship then asked the jury what damages they would give the plaintiff for the imprisonment, and what for the expenses incurred before the Master of the Rolls,—telling them, that, as the Lords Justices had allowed the plaintiff the costs of the proceedings on the appeal, the plaintiff had another remedy for them.

The jury returned a verdict against both defendants,—damages 250*l.* for the imprisonment, and also the costs of the proceedings before the Master of the Rolls, subject to taxation.

Pigott, Serjt., for Mrs. Casse, in Easter Term last, obtained a rule nisi to enter a verdict for her or a nonsuit, "on the ground that there was no evidence of a joint trespass with the other defendant, Smith;" or why such nonsuit should not be entered or a new trial be had

between the parties, "on the ground that the defendant (Mrs. Casse) is not liable as a trespasser upon the facts proved, and that the replication to the defendant's plea to the count in trespass, was not proved;" or why a new trial should not be had on the ground of misdirection as to damages, arising out of *the costs in Chancery. The [*611 learned Serjeant submitted that there was no evidence to affect Mrs. Casse. [BYLES, J.—She was apprised of the fact that the plaintiff was detained under the attachment, and she did nothing. She was domina litis: a word from her would have procured the plaintiff's release. Surely that was some evidence that she was an assenting party to what was done by Smith, and made her a co-trespasser. WILLES, J., referred to Cooper *v.* Harding, 7 Q. B. 928 (E. C. L. R. vol. 53). BYLES, J.—As to the first count, I ruled that, Smith having been fortified by the opinion of counsel, there was no case to go to the jury.] The learned Serjeant then submitted that the damages were excessive. [BYLES, J.—The court never interferes with the damages in an action of tort, unless they are outrageously excessive, or the jury have manifestly proceeded on a mistaken view.] As to the costs incurred before the Master of the Rolls, he submitted that those clearly could in no sense be considered as resulting from the trespasses complained of.

Parry, Serjt., for the defendant Smith, also obtained a rule nisi for a new trial, on the grounds,—first, that the defendant Smith was not liable as a trespasser upon the facts proved, and that the replication to the plea of the defendant Smith to the count in trespass was not proved, and the learned judge should so have directed the jury,—secondly, on the ground of misdirection as to the damages arising out of the costs in Chancery.

E. James, Q. C., *L. Temple*, and *Vaughan Williams* showed cause.—The short facts are these:—The plaintiff was retained by Mrs. Casse to conduct certain proceedings for her in Chancery, she undertaking to supply him with funds for necessary disbursements, and [*612 *also introducing the plaintiff to Mr. L. as the counsel to be employed on her behalf. The plaintiff having the misfortune to be taken in execution upon an unsatisfied judgment, Mrs. Casse thought fit to place the conduct of her affairs in the hands of another solicitor, the defendant Smith. Smith, upon being appointed solicitor in lieu of the plaintiff, obtained an order from the Master of the Rolls upon the plaintiff to deliver up to him all papers and documents in his possession, custody, or power, relating to the suits. Some of the papers being in the hands of Mr. L., the counsel, who claimed a lien upon them for fees due to him, and others in the hands of a law-stationer who also claimed a lien, and Mrs. Casse not providing the funds necessary to release those papers, the plaintiff was unable to comply with the order as to them. He accordingly filed an affidavit explaining the circumstances, and tendered to Smith all the papers which were in his actual custody. Smith thereupon made an affidavit that the plaintiff had neglected or refused to comply with the order, and obtained an attachment against him as of course, and so caused him to be detained in custody until, by appeal to the Lords Justices, the plaintiff procured the attachment to be set aside, on the ground that it had been unduly issued. Smith at the time he made that

affidavit knew the terms of the arrangement between Mrs. Casse and the plaintiff, and he must also have known that the exigency of the order required of the plaintiff no more than the delivery of those documents which were in his actual possession or under his actual control. The learned judge, therefore, could not have done otherwise than he did at the trial, viz.—to rule that Smith was without defence. It is true that the plaintiff had made an application to the Master of the Rolls to set aside the attachment, and that that learned judge declined
*613] to *interfere: but that, it is submitted, affords no justification for Smith's irregular and improper conduct in obtaining the attachment without disclosing all the circumstances. In the case of In re Walker, 14 Beavan 227, it was held that a party applying for an order of course should state everything which can have a bearing on the matter, otherwise the order will be discharged. "It is the duty," said the Master of the Rolls, "of every person who applies for an order of course, to state everything which can have a bearing on the matter, to enable the officer to judge whether an order of course ought to be granted, or whether the party should apply for a special order." It must, therefore, be assumed to have been asserted by Smith when he obtained the attachment, that all the documents which he required were in the custody or under the control of the plaintiff, and that he wilfully disobeyed the order of the court. In a subsequent case of Re Winterbottom, 15 Beavan 80, the same learned judge held that the rule laid down in Re Walker is to be strictly adhered to. There are numerous cases to show that an attorney is liable for the consequences of acts such as this: see Green v. Elgie, 5 Q. B. 99 (E. C. L. R. vol. 48), and the authorities there cited. If an attorney improperly calls upon the officer of the court to issue process when he ought not to do so, the attorney is liable in trespass: Davies v. Jenkins, 11 M. & W. 745: though he is not responsible for an erroneous exercise of discretion by a competent tribunal: Cooper v. Harding, 7 Q. B. 928 (E. C. L. R. vol. 53). In Parsons v. Lloyd, 3 Wils. 341, 345, De Grey, C. J., says: "There is a great difference between erroneous process and irregular (that is to say void) process: the first stands valid and good until it be reversed; the latter is an absolute nullity from the beginning: the party may justify under the first until
*614] it be reversed; but he cannot justify under the latter, *because it was his own fault that it was irregular and void at first." The like was held in Philips v. Biron, 1 Stra. 509. In Coddrington v. Lloyd, 8 Ad. & E. 459 (E. C. L. R. vol. 35), 1 P. & D. 157, it was held, that, where an arrest is made under process which is afterwards set aside for irregularity, the attorney is liable in trespass as well as the plaintiff in the suit; and if, in an action of trespass, the attorney justifies under the process, it is a good replication that the process was irregularly sued out, and was afterwards set aside by rule of court for irregularity. Lord Denman there says: "The plaintiff here was arrested on a writ which was afterwards declared by the court irregular. It was therefore as if there had been none. Then, is the attorney liable in this action for the arrest? A similar question was very fully discussed in Barker v. Braham, 3 Wils. 368, and the attorney was held liable as well as the client; and in Bates v. Pilling, 6 B. & C. 38 (E. C. L. R. vol. 13), 9 D. & R. 44, no doubt was enter-

tained, that, if the action lay against the principal, it lay also against the attorney. Indeed, there is a stronger reason for holding the attorney liable; since the party cannot be expected to know whether the process is regular in point of law or not." And see Jarmain *v.* Hooper, 6 M. & G. 827 (E. C. L. R. vol. 46), 7 Scott N. R. 663. In Collett *v.* Foster, 2 Hurlst. & N. 356, in trespass for false imprisonment, the defendant justified under a ca. sa., and the plaintiff replied that the ca. sa. was irregularly obtained, and set aside for irregularity. It was proved at the trial, that, judgment having been entered up against the plaintiff on a warrant of attorney for 60*l.* given to the defendant to secure the payment of a debt by instalments of which less than 20*l.* was due, the defendant's attorney caused the plaintiff to be arrested under a ca. sa., endorsed to levy 21*l.* 10*s.* The defendant, having been informed of the plaintiff's arrest by a person who had joined in the warrant of *attorney, wrote a letter in answer, not denying that such arrest had taken place by her authority. [*615 The writ was afterwards set aside by order of a judge. And it was held that the replication was proved, and that the defendant was liable in trespass for the act of her attorney in improperly causing the plaintiff to be arrested. If the attorney would be liable, the client is liable also. At all events, here, Mrs. Casse, if she did not order the trespass, knew of it, and did not interfere, and so became an assenting party to all that was done by Smith. [WILLES, J.—Upon the principle laid down by the Exchequer Chamber, in The Eastern Counties Railway Company *v.* Broom, 6 Exch. 314.] A suppression of facts is an irregularity: Alsager *v.* Fisk, 9 Dowl. P. C. 353. [WILLIAMS, J., referred to Rankin *v.* De Medina, 1 C. B. 183. There, to a plea in trespass quare domum fregit by A. and B., B. justified under a writ of fi. fa. upon a judgment obtained by B. against A. A. replied that the writ *was irregularly sued out and prosecuted*, and that, by a judge's order (subsequently made a rule of court), it was ordered that the writ and the proceedings thereon should be set aside,—not saying "*for irregularity.*" It was held, however, that the replication was good, as sufficiently showing that the writ was set aside *for irregularity.*] As to the damages,—the costs incurred by the plaintiff in the proceeding before the Master of the Rolls were necessarily incurred, and they were a damage consequent upon the irregular conduct of the defendants.

Pigott, Serjt., in support of his rule.—There was no evidence to warrant the conclusion that the attachment was procured by means of a false affidavit, or without reasonable and probable cause: and the defendants' pleas of justification were fully made out. *The alleged trespass was committed many months before the attachment was set aside; and it was set aside, not on the ground that it issued irregularly, but on the ground that the Master of the Rolls had erred in thinking that Williams had been guilty of contempt. In 2 Daniel's Chancery Practice, 3d edit. 811, it is said that "The process of contempt against a party for disobedience of a decree differs very little from the process issued for a contempt in not appearing and answering. The first step in the process is, a writ of attachment, the form of which is the same with that on mesne process, but the endorsement explains the purpose for which it was issued, which is also the [*616

case when the attachment is for non-payment of costs. This writ issues without order, upon the record and writ clerk being satisfied by affidavit of the due service of the order or decree." All that Smith did here, was, to make the ordinary affidavit that the order had been disobeyed: upon that the officer seals and issues the attachment. The issuing of the attachment was the necessary consequence of the disobedience of the order. The writ clerk could not refuse to issue it. The plaintiff's excuse for his disobedience was brought to the attention of the Master of the Rolls, and he held it to be insufficient. Assume that his judgment was wrong, and was properly reversed by the Lords Justices, what pretence is there for saying that either the solicitor or the client can be held liable for the consequences necessarily resulting from his error? In Prentice *v.* Harrison, 4 Q. B. 852 (E. C. L. R. vol. 45), D. & Meriv. 50, in trespass for false imprisonment, the defendant pleaded that he recovered a judgment against the plaintiff, and sued out a ca. sa. thereon (the judgment being in full force), under which ca. sa. the plaintiff was arrested, &c. The plaintiff replied that the ca. sa., after the issuing thereof, and before
*617] the commencement of the *suit, was set aside by a judge's order,—not stating the grounds of the order. The replication was held bad on special demurrer, inasmuch as the writ might, under supposable circumstances, have been set aside for reasons which would have been ground of error, and would not therefore have prevented such writ, until set aside, from being a justification to parties enforcing it; and the replication did not negative the existence of such circumstances. "The plaintiff," said Patteson, J., "was bound to show by his replication that the writ under which the defendants justify was set aside under such circumstances that it must have been illegal when they put it in force." [WILLIAMS, J.—Was Smith's affidavit a compliance with the 37th rule of the Consolidated Orders?] Yes.(a) In Daniels *v.* Fielding, 16 M. & W. 200, it was held that the declaration in an action for a malicious arrest under the 1 & 2 Vict. c. 110, must
*618] show that the party obtained *the judge's order for the capias by *falsehood* or *fraud*. Rolfe, B., in delivering the judgment of the court, there says: "The foundation on which such an action must now rest, is, that the party obtaining the capias has imposed on the judge by some false statement, some suggestio falsi or suppressio veri, and has thereby satisfied him not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor is about to quit the country. But, how will it be, if, without any such fraud or falsehood, a plaintiff, upon an affi-

(a) The 37th rule is as follows:—"The clerks of records and writs shall keep a seal in such form and bearing such impression as the Lord Chancellor shall approve; and any person desirous of suing out any of the writs specified at the end of this rule (of which attachment is one), may prepare the same in the present form, with such alterations and variations as circumstances may require, and may present such writ for sealing to the clerk of records and writs; and such writs shall be open writs, and it shall not be necessary for the Lord Chancellor to sign any such writ. And the clerks of records and writs, upon any such writ being presented for sealing, shall ascertain whether such writ is correct in form, and whether the person presenting the same is, according to the course and practice of the court, entitled to sue out the same; and in case it shall appear that such writ is correct in form, and that the person is entitled to sue out the same, such writ shall be forthwith sealed with such seal as aforesaid, and shall, when so sealed, have the same force and validity as such writ had when sealed with the great seal."

davit fairly stating the facts, succeeds in satisfying a judge that the defendant is about to quit the country, and so obtains an order for a capias to arrest the defendant, even though he may not himself believe that the defendant does intend to leave the country? If, indeed, the party arrested had not such intention, he has the power, under s. 6, of making a substantive application to a judge, or to the court, praying to be discharged out of custody; and this will be done as matter of course, if the party arrested succeeds in satisfying the judge or court that he had not nor ever had the intention imputed to him. *But such discharge affords no ground of action against the party at whose instance the party discharged has been held to bail, provided only that the original order of the judge has been fairly obtained.*" Those observations are especially pertinent here. [WILLES, J.—Under that statute, you have the opinion of the judge: but this is more like the issuing of mesne process under the old practice.] In Carratt *v.* Morley, 1 Q. B. 18, 28 (E. C. L. R. vol. 41), Lord Denman says: "It is clear from Cohen *v.* Morgan, 6 D. & R. 8, and other cases, and upon principle, that a party who merely originates a suit by stating his case to a court of justice, is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction." *Here, Smith's affidavit is perfectly true and bonâ fide. In Green *v.* Elgie, 5 Q. B. 99, [*619 (E. C. L. R. vol. 48), the warrant was void upon the face of it. That was an irregularity for which the party suing it out was clearly responsible. Then, is Mrs. Casse a trespasser, even if Smith is? She intrusts the conduct of the suit to him. Does the fact of her having made an affidavit, for which she would not have been liable if she had not been a party to the cause, render her liable because she *is* a party? [ERLE, C. J.—Both the attorney and the client would be liable if the writ was set aside for irregularity, if a proceeding in the cause.] Beyond her affidavit, there is nothing to charge her with any complicity, but the fact of her not having answered Williams's letter of the 27th of September, 1860. The learned judge at the trial seemed to think that fact constituted the only difference between her case and that of her son. [ERLE, C. J.—We do not sanction the notion that her mere omission to answer a letter makes her liable. WILLIAMS, J.—I do not see what possible authority Smith could have to imprison Williams unless he was acting for Mrs. Casse.]

Parry, Serjt., for Smith.—There is no pretence for holding Smith liable. He was guilty of no malice or bad faith. All he did, was, to take a step in the ordinary course of practice to enforce performance of an order: and, before he acted, he took the advice of counsel. [WILLIAMS, J.—Can there be a doubt that both attorney and client would be liable for the seizure either of the person or the goods of another under process which is set aside for irregularity?] This is not irregularity. Is an attorney to be held liable as a trespasser for doing that which had the sanction of the judgment of one of the highest judges of the land? [The learned Serjeant was stopped by the court.]

*ERLE, C J.—I am of opinion that these rules should be made absolute. The action is for trespass and false imprison- [*620 ment brought against Mrs. Casse and her attorney, Mr. Smith. The justification is, that, the plaintiff having disobeyed an order of the

Master of the Rolls directing him to hand over to Smith the papers and documents in certain suits in which the plaintiff had been concerned for Mrs. Casse, an attachment duly issued against him, under which he, being already in custody in execution, was detained. The replication is, that the writ of attachment was set aside by the Lords Justices, for irregularity, upon the ground that it had been obtained by and through the means of deceit and falsehood practised upon the court, to wit, by means of a false and fraudulent affidavit, and a false and fraudulent statement and suppression therein. It appears that the plaintiff being in confinement, Smith, who had been appointed Mrs. Casse's attorney in lieu of him, obtained an order from the Master of the Rolls for the delivery up to him of all papers and documents in the possession, custody, or power of the plaintiff, relating to the suits in which he had been concerned for Mrs. Casse. The disobedience of this order would be a contempt of court, which would subject the plaintiff to an attachment. The plaintiff was unable to comply with this order, because certain of the papers were in the hands of a law-stationer, who claimed a lien upon them for his bill for copying them, and certain others were in the hands of Mrs. Casse's counsel, who claimed, rightly or wrongly, a lien upon them for fees due to him in the causes. In this state of circumstances, Smith made an affidavit that the plaintiff had neglected or refused to obey the order of the Master of the Rolls, and upon that affidavit the clerk of the records and writs sealed and issued the writ of attachment under which the plaintiff was *detained. Now, it is agreed, upon all hands, that, if the proceedings had been set aside for irregularity, for the violation of any rule of practice, Smith would have been liable, and that, if the attorney be liable, as a general rule, the party employing him would be liable also. But here the affidavit was such as the clerk was bound to accept. There was nothing on the face of the proceeding to make it irregular. It is said that the attachment was irregular by reason of the omission to set out all the facts, and that, if the affidavit had stated the reason why the whole of the papers could not be delivered up, the writ would not have been issued, for that no judge would under the circumstances have thought that Williams was guilty of a contempt. That, however, is not so; because, when the very matter was afterwards brought before the Master of the Rolls upon the motion to set aside the attachment, he decided that those facts were not material, that Williams was guilty of contempt in not obeying the order, that an attorney is bound to have the command of all the papers in the cause, and that if his necessities have charged any of them with a lien, the attorney has failed in the performance of his duty. Such is the judgment of the Master of the Rolls on the very facts between these parties. The legal inference which that learned judge drew from the facts which were presented to him on the part of Williams, was, that he had been guilty of a contempt. Upon appeal, the Lords Justices were of opinion that the Master of the Rolls came to an erroneous conclusion, and they reversed his decision. They thought, that, if, in consequence of the failure of the client to make advances which she had undertaken to make, the papers became charged with a lien, it is a strong thing to say that the attorney was guilty of contempt for not delivering up

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papers which were placed beyond *his control through no fault of his own. That is a totally different thing from setting aside the attachment for irregularity in the proceedings. If Smith had gone before the Master of the Rolls in the first instance, and he had ordered the attachment to issue, he could not have been held responsible. In Cooper *v.* Lewis, 2 Phillips 178, it was held by Lord Cottenham, that, if a petition for an ex parte order suppresses any fact which, whether really material or not, would, if communicated to the officer whose duty it is to draw up the order, prevent him from doing so without mentioning the matter to the court, the order will be discharged for irregularity. There, the party obtained the order by suppressing a fact which it was his duty to mention: and the court held that the order had been obtained irregularly, by reason of that concealment. It is immaterial whether it be called an irregularity or anything else. But there is this distinction between that case and the present, viz. that there the fact suppressed was a material fact, and the order would not have been granted if it had been communicated to the officer. Here, there was, in the opinion of the Master of the Rolls, no material fact suppressed; for, he refused to set aside the attachment upon an affidavit stating the fact the suppression of which the plaintiff relies on. [*622

WILLIAMS, J.—I am of the same opinion. If the attachment in this case had been set aside on the ground of irregularity or that it was issued in bad faith, or in any other way equivalent to irregularity, I should have thought that both the attorney and the client would be liable for any imprisonment which took place under it. But, upon the facts which appeared at the trial, it is not true that the attachment was set aside for irregularity or on the ground that it was issued in bad faith. The *affidavit upon which it issued was sworn by Smith in the ordinary course of justice: and the Master of the Rolls was satisfied that it was a proper one upon which to found an attachment. It was not suggested, when the application was made to that learned judge to set aside the attachment, that there was any fault in the affidavit, but merely that the issuing of the attachment was not warranted by the circumstances. The Master of the Rolls, however, came to the conclusion that the facts did warrant the attachment. That opinion of the Master of the Rolls was pronounced by the Lords Justices upon appeal to be erroneous. That brings the case within that class of cases where it has been held that the party causing process to be issued is not responsible for anything that is done under it, where the process is afterwards set aside, not for irregularity, but for error. It follows, therefore, that the order of the Lords Justices setting aside the attachment in this case, does not prevent the parties from being protected against the consequences of what was done under the attachment. The action, therefore, is barred. [*623

WILLES, J.—I am of the same opinion. It by no means follows that because a writ or an attachment is set aside, an action for false imprisonment lies against those who procured it to be issued. If that were so, this absurd consequence would follow, that every person concerned in enforcing the execution of a judgment would be held responsible for its correctness. Where an execution is set aside on

the ground of an erroneous judgment, the plaintiff or his attorney is no more liable to an action than the sheriff who executes the process is. Where a judgment is set aside for error, the proper course is, not to bring an action, but to proceed by writ of restitution or by the
*624] course which *the modern practice has substituted for it. I entirely agree with what has been laid down by my Lord and my Brother Williams, that, in order to entitle the party against whom the process issues to maintain an action for any intermediate acts done under it, he must show that the process has been set aside by reason of some misconduct, or at least some irregularity, on the part of the person suing it out. It has been contended here, that the attachment was set aside for misconduct or irregularity,—that Smith was guilty of a fraudulent suppression of facts in the affidavit upon which he procured the attachment to be issued, and that it was upon that ground that the Lords Justices ordered it to be set aside. That is simply contrary to the fact. The question before the Master of the Rolls, and afterwards before the Lords Justices on appeal, was, not whether, supposing that Williams was liable to be attached for disobedience of the order for the delivery up of the papers, the affidavit sworn by Smith was sufficient to bring such liability before the court. It was not upon the sufficiency of the affidavit, but on the substantial question whether Williams was liable to be attached, that the case came before the Master of the Rolls. The Master of the Rolls, by refusing to set aside the attachment, adopted it; and the issuing of it thus became the act of the court, just as if it had been moved for and granted in open court. The matter then went before the Lords Justices on appeal. They passed no judgment upon the sufficiency of the affidavit. What they decided, was, that the Master of the Rolls was mistaken in thinking that a contempt of court had been committed; and on that ground they set aside the process. Restitution, therefore, and not action, was the plaintiff's proper remedy. This is simply one of that numerous class of cases,—and I have no wish to
*625] limit *their extent,—where the acts of the court, if erroneous, cannot be made the foundation of an action for damages. If it were otherwise, suitors would incur responsibilities which it would be fearful to contemplate.

Byles, J.—I am of the same opinion. The defendants are clearly entitled to have the verdict entered for them. There is a manifest distinction between setting aside process for irregularity, and reversing a proceeding for error on appeal. In the one case, a man acts irregularly and improperly without the sanction of any court. He therefore takes the consequences of his own unauthorized act. But, where he relies upon the judgment of a competent court, however erroneous that judgment may be, the party acting upon the faith of it ought to be protected. The question is, whether there has been here that which can be considered as irregular or improper conduct either on the part of Mrs. Casse or her solicitor Smith. The attachment is a sort of excrescence on the cause, arising out of the party's disobedience of an order of the court. The Master of the Rolls orders the attachment, and the now defendants afterwards act upon it. I cannot distinguish between what was done before and what was done after the application made by Williams to the Master of the Rolls to set aside the attach-

ment. This action is, in effect, in the nature of an appeal against the decision of the Master of the Rolls: and, upon general principles, I think the defendants are entitled to succeed. Whether in a case of this kind the client would have been liable to an action if the solicitor was, it is unnecessary to give any opinion. But I desire not to be understood as expressing any doubt upon the subject.

Rule absolute accordingly.

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*EARLE *v.* MAUGHAM. *June* 8. [*626

A tenant who has been compelled by the "building owner" to pay the proportion of the expenses of a party-wall or structure which was payable under the Metropolitan Building Act, 1855, by his landlord, the "adjoining owner," may maintain an action against the latter to recover the sum so paid, and is not bound (though entitled) to deduct it from rent due or accruing due.

THE first count of the declaration stated that the plaintiff before and at the times thereinafter mentioned was, and still remained, the occupier of certain premises as tenant thereof to the defendant, the said premises being situate within the limits to which the Metropolitan Buildings Act, 1855, is applicable, and adjoining to other premises within the said limits, and divers expenses were incurred by the owner of the said last-mentioned premises for and in respect of work executed to and in respect to a party-wall or structure by which the said several premises were separated, he being the building owner and the defendant being the adjoining owner within the meaning of the said act, a proportion of which expenses was by and according to the said act to be borne by the defendant as such adjoining owner; and the plaintiff, as occupier of the said first-mentioned premises, was obliged to pay and did pay to the said building owner a certain sum of money, to wit, 126*l.* 10*s.* 11*d.*, as and for the said proportion; and that all things were done by the plaintiff, and all things happened, and all times had elapsed, necessary to entitle the plaintiff to be paid by the defendant the said sum of money; yet that the defendant had not paid the same.

The defendant demurred to the first count, the ground of demurrer stated in the margin being, "that the amount sought to be recovered in the first count is not recoverable by action at law." Joinder.

Heath, in support of the demurrer.—The question turns upon the construction of certain provisions in the Metropolitan Buildings Act, 1855, 18 & 19 Vict. *c. 122. By the interpretation clause, s. 3, [*627 it is enacted that "owner" shall "apply to every person in possession or receipt either of the whole or of any part of the rents or profits of any land or tenement, or in the occupation of such land or tenement, other than as tenant from year to year or for any less term, or as a tenant at will." It stands admitted upon the record that the expenses incurred by the "building owner" were of such a nature as to entitle him to recover them from the "adjoining owner." The 89th section enacts, that, "within one month after the completion of any work which any building owner is by this act authorized or required to execute, and the expense of which is in whole or in part to be borne by an adjoining owner, such building owner shall deliver to

the adjoining owner an account in writing of the expense of the work, specifying any deduction to which such adjoining owner or other person may be entitled in respect of old materials or in other respects; and every such work as aforesaid shall be estimated and valued at fair average rates and prices according to the nature of the work and the locality and the market-price of materials and labour at the time." The 90th section gives the adjoining owner a right of appeal within one month after the delivery of such account, if dissatisfied therewith: and s. 91 enacts, that "if within such period of one month as aforesaid, the party receiving such account does not declare in manner aforesaid his dissatisfaction therewith, he shall be deemed to have accepted the same, and shall pay the same, on demand, to the party delivering the account, and if he fails to do so the amount so due may be recovered as a debt." [WILLES, J.—The question we have to decide arises upon the 97th section.] That section enacts, that, "where it is hereby declared that expenses are to be borne by the owner of any
*628] premises *(including in the term 'owner' the adjoining and building owner respectively), the following rules shall be observed with respect to the payment of such expenses:—1. The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first instance pay such expenses, with this limitation, that no occupier shall be liable to pay any sum exceeding in amount the rent due or that will thereafter accrue from him in respect of such premises during the period of his occupancy. * * * 5. Any occupier of premises who has paid any expenses under this act may deduct the amount so paid from any rent payable by him to any owner of the same premises; and any owner of premises who has paid more than his due proportion of any expenses, may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises. 6. If default is made by any owner or occupier in payment of any expenses hereby made payable by him in the first instance, or if default is made by any owner in payment of any other expenses or moneys due from him by way of contribution or otherwise in pursuance of this act, then, in addition to any other remedies hereby provided, such expenses and moneys, if arising in respect of any matter within the provisions of the Third Part of this Act, may be recovered as a debt in due course of law, but, if arising in respect of any other matter under this act, may be recovered in a summary manner." The summary manner is provided by s. 103, before a magistrate. [WILLES J.—The summary manner applies to matters which are not within the Third Part of the act. This *is* within the Third Part.] The remedy is by deduction by the occupying tenant from his accruing rent. [ERLE, C. J.—The 6th part of s. 97 expressly makes the expenses recoverable "as a debt in due
*629] course of law."] That rule applies only as *between owner and owner. The plaintiff's only remedy is by deduction from the rent under the 5th rule. [BYLES, J.—The declaration is exceedingly obscure. It does not show what the nature of the plaintiff's occupation was.] A payment beyond the party's occupation is a payment in his own wrong. Mourilyan *v.* Labalmondiere, 1 Ellis & Ellis 533 (E. C. L. R. vol. 102). In Evelyn *v.* Whichcord, E. B. & E. 126 (E. C. L. R. vol. 96), a ground-landlord at a peppercorn rent was held not to be

an owner within the statute. [WILLIAMS, J.—Is there any provision in the act to compel the *owner* to pay? If there is, then the case comes within the rule, that, if one is compelled to pay money which another is liable for, the law will imply a request. *Mellish*, Q. C.—The 91st section expressly enables the building owner to sue the adjoining owner.] Under the 1st rule of s. 97, this plaintiff could not have been compelled to pay the sum here claimed. [ERLE, C. J.—It is alleged in the declaration, and admitted by the demurrer, that 126*l.* 10*s.* 11*d.* is the proportion which the plaintiff was bound to pay.]

Mellish, Q. C., contrà, was stopped by the court.(*a*)

*ERLE, C. J.—The "building owner" has incurred certain [*630 expenses in the erection of a party-wall or structure, for which the defendant as the "adjoining owner" is liable under the Metropolitan Building Act, 1855. The plaintiff is the occupying tenant. Now, the statute gives the building owner a right to compel the tenant of the adjoining owner to pay such expenses to the extent of any sum not exceeding in amount the rent due or that will thereafter accrue due from him in respect of the premises during the period of his occupancy. Here, the plaintiff, the tenant, has paid to the building owner 126*l.* 10*s.* 11*d.* as and for the proportion of the expenses which was by the act to be borne by the defendant as the adjoining owner. The question is, whether there is anything in the statute to enable the tenant to bring an action to recover back the sum so paid; it being clear that he has a right to deduct it from the accruing rent,—a fund which in its essence is contingent. Does the statute do more than enable him to deduct it? Our attention has been called to various sections of the statute, and, amongst others, to the 89th, which enacts, that, "within one month after the completion of any work which any building owner is by this act authorized or required to execute, and the expense of which is in whole or in part to be borne by an adjoining owner, such building owner shall deliver to the adjoining owner an account in writing of the expense of the work, specifying any deduction to which such adjoining owner or other person may be entitled in respect of old materials or in other respects; and every such work as aforesaid shall be estimated and valued at fair average rates and prices, according to the nature of the work and the locality, and the market-price of materials and labour at the time." The 90th section enacts that "at any time within one month after the delivery of such *account, the adjoining owner, if dis- [*631 satisfied therewith, may declare his dissatisfaction to the party delivering the same, by notice in writing given by himself or his agent, and specifying his objections thereto; and, upon such notice having been given, a difference shall be deemed to have arisen between

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That, although the plaintiff is, according to the statute 18 & 19 Vict. c. 122, s. 97, entitled to deduct the expenses paid by him from the rent payable by him to the defendant, there is nothing contained in that act of parliament which prevents the plaintiff from suing the defendant for recovering the amount of such expenses:

"2. That, if the plaintiff cannot sue for recovery of the money so paid by him for the defendant, and has no other remedy than by deducting against the rent as it accrues due, the plaintiff would necessarily be without the use of or interest upon his money whilst it was thus being repaid by instalments:

"3. That, by the 6th rule in the 97th section, it is expressly provided that such expenses and moneys 'may be recovered as a debt in due course of law.'"

the parties, and such difference shall be determined in manner hereinbefore [s. 85] provided for the determination of differences between building and adjoining owners." And then s. 91 enacts, that, "if within such period of one month as aforesaid the party receiving such account does not declare in manner aforesaid his dissatisfaction therewith, he shall be deemed to have accepted the same, and shall pay the same, on demand, to the party delivering the account; and, if he fails to do so, *the amount so due may be recovered as a debt.*" It is clear, therefore, that the building owner might have sued the defendant for the sum which he has made the tenant pay to him: it was a debt due to him from the adjoining owner. The question which was put by my Brother Williams during the argument is thus answered. Does, then, the 97th section prevent the tenant from calling upon his landlord, the adjoining owner, by action, to recoup him what he has paid? It enacts, that, "where it is hereby declared that expenses are to be borne by the owner of any premises (including in the term 'owner' the adjoining and building owner respectively), the following rules shall be observed with respect to the payment of such expenses: 1. The owner immediately entitled in possession to such premises, or the occupier thereof, shall in the first place pay such expenses, with this limitation, that no occupier shall be liable to pay any sum exceeding in amount the rent due or that will thereafter accrue due from him in respect to such premises during the period of his occu-
*632] pancy." Then, after *some provisions not now material, it goes on,—"5. Any occupier of premises who has paid any expenses under this act, may deduct the amount so paid from any rent payable by him to any owner of the same premises; and any owner of premises who has paid more than his due proportion of any expenses, may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises. 6. If default is made by any owner or occupier in payment of any expenses hereby made payable by him in the first instance, or if default is made by any owner in payment of any other expenses or moneys due from him by way of contribution or otherwise in pursuance of this act, then, in addition to any other remedies hereby provided, such expenses and moneys, if arising in respect of any matter within the provisions of the Third Part of this act, may be recovered as a debt in due course of law, but, if arising in respect of any other matter under this act, may be recovered in a summary manner." It is impossible, I think, for a provision to be more decisively clear and free from ambiguity or doubt. The plaintiff is entitled to the judgment of the court.

WILLIAMS, J.—I am entirely of the same opinion. For the reasons so clearly stated by my Lord, I think the case falls within the rule laid down in Lampleigh *v.* Brathwait, Hob. 106, and in the notes to Osborne *v.* Rogers, 1 Wms. Saund. 264. A similar power of deduction is given by the Land-Tax Act, 38 G. 3, c. 5, s. 17. In Stubbs *v.* Parsons, 3 B. & Ald. 516 (E. C. L. R. vol. 5), where a plea in bar in replevin setting up payments on account of land-tax was held bad for not stating that the payments were made after the rent distrained for had accrued or was accruing, Bayley, J., says: "A payment to the

land tax can only be deducted out of the rent which *has then accrued or is accruing due; for, the law considers the payment [*633 of the land-tax as a payment of so much of the rent then due, or growing due, to the landlord; and if afterwards he (the tenant) pays the rent in full, he cannot at a subsequent time deduct that over-payment from the rent: *he may, indeed, recover it back as money paid to his landlord's use.*" And Holroyd, J., says: "The occupier has a lien on the next rent given him by the legislature for the land-tax paid by him; but, if he parts with the rent without making the deduction, he loses his lien, and has only his remedy by action or set-off, and the latter is not allowed in replevin."

WILLES, J.—I am of the same opinion.

BYLES, J.—I am of the same opinion: and I would add, that, if this were not the true construction of the Metropolitan Building Act, the occupying tenant would in many cases suffer prodigious wrong. He might be called upon to pay a large sum on account of his landlord, and might have to wait several years to be recouped.

Judgment for the plaintiff.

*HANCOCK *v.* AUSTIN. *May* 22. [*634

The owner of a factory consisting of several rooms was in the habit of letting "standings" therein for lace-machines, himself supplying the power for working them, there being no demise of the room:—Held, that the weekly payments could not be distrained for as "rent."

An entry for the purpose of making a distress through a window which is fastened by means of a hasp, is not lawful.

THIS was an action for an illegal and excessive distress, with a count for the conversion of the plaintiff's goods, to wit, lace-machines.

The cause was tried before Erle, C. J., at the last Summer Assizes at Derby. The facts were as follows:—The defendant was possessed of a factory consisting of several rooms in which he let "standings" for lace-machines, supplying the steam-power by which they were put in motion, and reserving to himself the right of entering the rooms for the purpose of oiling the bearings of the shafting,—portions of the same room being sometimes allotted to different persons. In one of these rooms the plaintiff had hired standing for three lace-machines, and power, for which he was to pay 12*s.* per week. The rent being in arrear, and the plaintiff having gone out and locked the door of the room where the machines were, the defendant placed a ladder to the window (which was fastened with an ordinary hasp), and his son, without breaking anything, opened the window and got into the room, when the plaintiff entered by the door and distrained the machines, and afterwards sold them.

On the part of the plaintiff it was insisted that, inasmuch as there was no demise of the room, but merely a license to place the machines there, the defendant was not entitled to distrain; and, further, that the mode of entering for the purpose of distraining was unlawful.

A verdict was by consent taken for the plaintiff for 150*l.*, subject to be reduced to 40*l.* (the sum at which the jury assessed the damages on the count in trover), if the court should be of opinion that the

*635] defendant *was under the circumstances entitled to distrain, and had properly exercised his right.

Hayes, Serjt., accordingly, in Michaelmas Term last, obtained a rule nisi to reduce the damages to 40*l*., on the ground that the exclusive possession of the premises on which the machines stood was not demised to the plaintiff, and that, even if it were, the entry by the window, without breaking any fastening, was lawful, for the purpose of distraining. He cited Viner's Abridgment, *Distress* (M), pl. 2, 7, where it is said, referring to 29 Ass. 49, that "a man may distrain for the rent of an house per ostia et fenestras," and Ryan *v.* Shilcock, 7 Exch. 72. [WILLIAMS, J., referred to Buszard *v.* Capel, 8 B. & C. 141 (E. C. L. R. vol. 15), 2 M. & R. 197.]

Merewether (with whom was *Macaulay*, Q. C.) showed cause.—The distress was altogether illegal. There was no demise, and consequently no right to distrain. All that passed to the plaintiff by the agreement, was, a right to have standing-room for his machines, and power to work them. In Buszard *v.* Capel, it was stated in a special verdict, that, by an indenture, A. demised to B. all that wharf next the river Thames, described by abutments, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the said wharf belonging; and that by the indenture the exclusive use of the land of the river Thames opposite to and in front of the wharf, between high and low-water mark, as well when covered with water as when dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but that the land itself between high and low-water mark was not demised: and Lord Tenterden, in giving the judgment of the Court of Queen's Bench (8 B. & C. 150), said: "It is difficult to *understand what is really meant by that part of the finding of the jury, 'that the exclu- *636] sive use of the land of the river Thames opposite to and in front of the said wharf ground between high and low-water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the said wharf ground and premises, but that the land itself between high and low-water mark was not demised.' And it is difficult to understand how the exclusive use could be demised and the land not: but, in either case, the distress cannot be supported. If the meaning of this finding be, that the land itself was demised as appurtenant to the wharf, that would be a finding that one piece of land was appurtenant to another, which in point of law cannot be. If, on the other hand, the meaning be, that the use and enjoyment of this land passed as appurtenant, that would be a mere privilege or easement, and the rent would not issue out of that: the landlord, therefore, could not distrain there for rent issuing out of the land in respect of which the easement or privilege had its existence. Taking the finding of the jury in either sense, the defendant had no right to distrain on the premises in question." And, when the case came before the court of error (Capel *v.* Buszard, 6 Bingh. 150 (E. C. L. R. vol. 19), 3 M. & P. 480, 3 Y. & J. 344), Alexander, C. B., said: "It cannot be denied that the law is generally understood to be as laid down by the Lord Chief Baron Comyns in his Digest, title *Distress* (A. 3.), that, for rent reserved upon a lease, a man may distrain upon any part of the land out of

which the rent issues; evidently implying a negative, that he can distrain nowhere else. It would surely be vain to contend that the rent issued out of the soil of this navigable river. Much ancient learning has been ingeniously brought into action upon this occasion, to prove that a distress *may be taken upon an easement or a right analogous to what the tenants are supposed to have had upon the river in this case. But none of the cases cited, when examined, warrant the proposition. The total absence of all clear and direct authority upon such a point, is, I think, decisive against it." Then, as to the second part of the rule, the mode of entry here adopted clearly was unlawful. There is a marked distinction between the case of an entry by a landlord and an entry by the sheriff, but both must enter by the usual means: see the notes to Semayne's Case (5 Co. Rep. 91), in 1 Smith's Leading Cases, 5th edit. 91 et seq. [*637

Hayes, Serjt., and *Field*, in support of the rule.—The plaintiff had no exclusive right to the possession of the room, but only to that portion of the floor on which his machines stood. The defendant's entry, therefore, being lawful, he had a right to distrain. This is like the case of stallage in a market: The Mayor, &c., of Yarmouth *v.* Groom, 1 Hurlst. & Colt. 102. In Gould *v.* Bradstock, 4 Taunt. 562, it was held that trespass would not lie against a landlord who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, for taking up the floor of his own apartment, and entering through the aperture to distrain for rent. Sir J. Mansfield there says: "What is decided in this case will not do much harm or good as a precedent, for probably the circumstance never happened before, or will ever happen again: but the case is this,—the defendant removes the floor of his room, which floor was his: it is said that it served as a ceiling to the tenant below; but that, at most, could only make him tenant in common, and one tenant in common, although he probably might have some remedy or other for being disturbed in the use of his ceiling, *cannot bring trespass against his companion. After the defendant has moved the boards, he can get into the house, and that without a trespass; and when he can get into the house without trespass, he may lawfully distrain." In Ryan *v.* Shilcock, 7 Exch. 72, it is laid down that a landlord, in order to distrain, may open the outer door by the usual means adopted by persons having access to the building, and therefore he may open it by turning the key, by lifting the latch, or by drawing back the bolt. [ERLE, C. J.—Is placing a ladder to a window one of "the usual means adopted by persons having access to the building?"] No violence was committed. [ERLE, C. J.—I observe that Pollock, C. B., referring to a passage cited from Fitzherbert's Abridgment, title *Distress*, pl. 21, says: "It is pretty manifest that the operation alluded to in the preceding passage very much resembles that of a person who, on finding a hole in a door or pane of glass, puts his hand in through the hole to remove the fastening of the door or window, and so gains admittance into the premises, which no doubt amounts to both a burglary and trespass, as such is not the accustomed mode of obtaining admittance into the premises."] In Tutton *v.* Darke, 5 Hurlst. & N. 647, it was held that an entry to make a distress through an open window is lawful. [*638

ERLE, C. J.—This is an action brought for the conversion of three lace-machines, of the value, as the jury have found, of 150*l.*, which were seized and sold by the defendant. The defendant had leave to move to reduce the verdict to 40*l.* if the court should be of opinion that under the circumstances the defendant had a right to distrain; inasmuch as in that case he would not be liable as a trespasser, but only to such damages as the plaintiff might have sustained from *639] *any illegality in the mode of taking or disposing of the distress. But, if the defendant had no right to distrain, he must pay the full value of the goods taken. Now, the facts are these:—The plaintiff had hired of the defendant standing and power in a room in a factory for the working of three lace-machines; the power being conducted to them by means of shafting in the ordinary way, which it was the defendant's duty to oil and keep in efficient working order. It is insisted on the part of the defendant that there was no demise of the room itself, and consequently that the landlord could not be guilty of a trespass in entering it by whatever means. There may possibly be much in that argument. But the first question is, whether there was any distrainable rent, there being no demise of the room, but only a bargain for standing for the plaintiff's machines. I am clearly of opinion that the stipulated sum of 12*s.* a week was not a rent issuing out of the realty, but only a payment for a privilege or easement. In no sense can it be called rent, or distrainable for as rent: but the owner of the factory is put to his action to enforce payment of the agreed sum. But I am of opinion, that, if there had been a demise of the room, the landlord had no right to enter in the way he did, the window being fastened with a hasp. So entering for the purpose of distraining would render the defendant a trespasser, even if there had been a demise. That is a dilemma which the defendant cannot extricate himself from. There has been no lawful exercise of the right to distrain, even if such a right existed. It follows, therefore, that the defendant has been guilty of a trespass, and must pay the value of the goods.

WILLIAMS, J.—I am entirely of the same opinion. Two views *640] have been presented in argument, upon *one or other of which, it is said, the distress was justifiable. It is said that the whole room was the subject of the demise, and the alleged impropriety of the distress falls to the ground. If the room was demised, the plaintiff contends that the mode of entry for the purpose of distraining was unlawful. If that be so, no doubt the plaintiff is right. It is well known that the landlord cannot exercise his power of distraining by breaking open an outer door or a window. Here there was a clear breaking of the window. The defendant, however, insists that he did not part with the exclusive possession of the room, but only let the plaintiff a right of standing for his lace-machines. The question then arises, whether there can be a right to distrain for rent for so much of the floor as the machines stood on. I am clearly of opinion that the facts do not disclose a demise of the floor so as to authorize a distress for the agreed rent. To authorize a distress, there must be a demise at a rent, and a reversion. It is impossible to say here that the 12*s.* a week agreed to be paid is a rent issuing out of the ground

on which the machines stood. There was no demise, and no right to distrain, and therefore in that sense the defendant was a trespasser.

The rest of the court concurring, Rule discharged.

*RUMSEY *v.* THE NORTH-EASTERN RAILWAY COMPANY. *June* 10. [*641

The 39th section of the North-Eastern Railway Company's Act, 17 & 18 Vict. c. cxi., enacts that "every passenger travelling upon the said railways may take with him his ordinary luggage, not exceeding 150 lbs. in weight for first-class passengers, and 100 lbs. in weight for second and third-class passengers, without any extra charge being made for the carriage thereof:"—Held, that this does not preclude the company from making special arrangements for the exclusion of luggage by cheap excursion trains.

The plaintiff took an excursion-ticket for a journey from Scarborough to Whitby, for which he paid 5*s.*, knowing that the company declined to carry any luggage for passengers travelling with excursion-tickets, and that, if he went (as he might have done by the same train) as an ordinary passenger, with luggage, the price of the ticket would be 9*s.* Before taking his ticket, the plaintiff had procured one of the company's porters to place his portmanteau in the luggage-van, not informing the porter how he was going to travel. On arriving at Malton, an intermediate station, the plaintiff requested that his portmanteau might be taken out of the van, to await his return from Whitby, on his way to York. The guard, however, refused to allow this to be done, the portmanteau not being booked; and it was accordingly carried on to Whitby, where the company's servants refused to deliver it up without being paid for the carriage from Scarborough to Whitby:—Held, that the circumstances raised an implied contract for the carriage of the portmanteau for hire, and therefore that the company were justified in detaining it.

THIS was an action against the North-Eastern Railway Company for the alleged unlawful detention of a portmanteau containing personal luggage and samples belonging to the plaintiff, a commercial traveller.

The cause was tried before Martin, B., at the last Spring Assizes at York. The facts which appeared in evidence were as follows:—The North-Eastern Railway Company are in the habit of running excursion trains to and from the various watering-places on the coast, for which, besides the ordinary tickets, they issued others at a lower rate of charge on the condition (advertised by placards and handbills) that persons availing themselves of these tickets should carry with them no luggage. Towards the end of October last, the plaintiff, who wished to go from Scarborough to Whitby and thence to York, went to the railway station at Scarborough with a portmanteau containing the articles before mentioned. Having got a porter to place the portmanteau in the luggage-van, the plaintiff proceeded to the booking-office and there obtained from the clerk a ticket,—a first-class day-ticket, having the word "Excursion" printed upon it,—for which he paid 5*s.*; the price of an ordinary day-ticket for the *same journey being 9*s.* The course of the journey was from Scarborough [*642 to Rillington, thence to Malton, where those passengers who are going to Whitby get out and proceed by another train. When the train arrived at Malton, the plaintiff asked the guard to take the portmanteau out of the van, intending to leave it at Malton, in order that it might, on his return from Whitby, go on with him to York. The guard declined to do this, telling him, that, as it was not booked for York, it must go on with him to Whitby. On his arrival at Whitby, the plaintiff went to the Commercial Inn, whence he sent the boots to the station for the portmanteau. The station-master refused to give

it to him unless he paid 3*s.* 1*d.* for the carriage,—2*s.* from Scarborough to Malton, and 1*s.* 1*d.* from Malton to Whitby.

On his cross-examination, the plaintiff denied that he had seen the company's placards announcing that no luggage was allowed to be carried by passengers travelling with excursion-tickets; but he admitted that he had seen a smaller handbill containing the same announcement.

On the part of the plaintiff, reliance was placed upon the 39th section of the company's consolidation act of 17 & 18 Vict. c. ccxi., which enacts that "every passenger travelling upon the said railways may take with him his ordinary luggage, not exceeding 150 lbs. in weight for first-class passengers, and 100 lbs. in weight for second and third-class passengers, without any extra charge being made for the carriage thereof;" and it was insisted that this provision was imperative upon the company under all circumstances.

On the part of the defendants it was submitted that the 39th section of the statute applied to passengers travelling in the ordinary way, and did not extend to prevent the company from making special
*643] bargains for *the exclusion of luggage from excursion-trains, which from their nature required special arrangements which would be frustrated by the trouble and delay necessarily attendant upon the conveyance of luggage.

The learned Baron, however, ruled that the act of parliament entitled every passenger to carry with him the stipulated quantity of personal luggage, and that no regulation of the company could deprive him of that right, and consequently that the plaintiff was entitled to a verdict.

The jury accordingly returned a verdict for the plaintiff, damages 40*s.*

S. Temple, Q. C., in Easter Term last, obtained a rule nisi, for a new trial, on the ground of misdirection on the part of the learned judge in "telling the jury that the company's act of 1854 entitled the plaintiff to have his luggage carried with him free."(*a*)

Quain now showed cause.—The plaintiff did not deliver the portmanteau to the company, nor did they receive it, to be carried for hire: it was delivered and received as passenger's luggage. [ERLE, C. J.—The plaintiff, knowing that with his "excursion-ticket" he had no right to take luggage, palms himself off as an ordinary traveller, and so seeks to get his portmanteau carried for nothing.] The company's servants might have refused to take it.(*b*) In Cahill *v.* The
*644] London *and North-Western Railway Company, 10 C. B. N. S. 154 (E. C. L. R. vol. 100);(*c*) where a passenger sought to carry with him as luggage a package containing merchandise, it was

(*a*) There was another point made, viz. whether, inasmuch as the portmanteau in question contained "samples," as well as personal luggage, and this was not disclosed to the company's servants, or capable of being ascertained by mere inspection of the package, the company were under any duty to carry it free. But the rule was refused on this, there being no materials before the court to raise it.

(*b*) It was stated that the train in question was not exclusively an "excursion train;" but that "excursion-tickets" were issued to persons wishing to avail themselves of it; and that the price of the ordinary day-ticket, which would entitle the passenger to carry luggage with him, was 9*s.*

(*c*) Affirmed in the Exchequer Chamber, 13 C. B. N. S. 818 (E. C. L. R. vol. 106).

held that there was no contract on the part of the company to carry it, and consequently that they were not liable for the loss of it. Willes, J., there says: "The true answer to the plaintiff's claim is, that there never was any contract on the part of the company to carry the package which was lost. The only contract which they entered into with the plaintiff, was, to carry himself and his personal luggage not exceeding 100 lbs. in weight." There being no contract, therefore, with the company to carry the plaintiff's portmanteau for hire, they were not justified in demanding a sum for the carriage of it. They cannot be entitled to charge for the carriage, when they would not be liable for the loss of the article. [WILLES, J., referred to The Belfast and Ballymena Railway Company *v.* Keys, 1 House of Lords Cases 556.] Assume that there was a wilful misrepresentation on the part of the plaintiff, there clearly was no contract to pay for the carriage. [WILLIAMS, J.—Suppose the company had sued the plaintiff for the carriage, alleging a request to carry and a promise to pay, the question would be whether the conduct of the party did not amount to a request to carry for hire. Does not the conduct of the plaintiff here amount to a request?] It is submitted that it does not. [WILLES, J.—A citizen of London is entitled to bring his cart into the city toll-free. Suppose a man who is not a citizen claims the *immunity, might he not be sued for the evasion?] In The Great Northern Railway Company *v.* Sheppard, 8 Exch. 30, [*645 where a similar question to this arose, Lord Wensleydale says: "The judge states that there was no evidence at to whether the defendants carried passengers by this excursion train upon the terms contained in the 6th section of the 7 & 8 Vict. c. lxxxv. (the special act), unless the court shall be of opinion that the fact that the charge for each passenger was less than a penny a mile was of itself sufficient proof that they carried upon those terms. That, however, it is not necessary to decide; because, assuming that they did not carry on those terms, the defendants only agreed for a stipulated fare to carry passengers and everything which constituted personal luggage, and were not bound to carry merchandise or articles wholly unconnected with luggage." At all events, the company had no right to charge for the carriage of the portmanteau from Malton to Whitby against the plaintiff's will. An excessive demand operates as a waiver of a lien. [WILLES, J.—There must be something more than a demand of an excessive sum, to constitute a waiver: Scarfe *v.* Morgan, 4 M. & W. 270; Allen *v.* Smith, 12 C. B. N. S. 638 (E. C. L. R. vol. 104.) ERLE, C. J.—The plaintiff required the company to deliver the portmanteau gratis.] In Jones *v.* Tarleton, 9 M. & W. 675, it was held, that, in trover by the owner of goods against a carrier who has detained the goods under a claim of lien, it is not necessary, in order to entitle the plaintiff to recover, that he should prove an actual tender of the carriage-money, if it appear that he was ready to pay it, but that the defendant refused to deliver the goods except on payment of an alleged old balance, which the jury find not to have been really due. [ERLE, C. J.—There is no pretence for saying that the plaintiff was ready to pay anything here.] The *words of the 39th section of the [*646 company's act are imperative, and apply to all trains whether excursion trains or ordinary trains.

S. Temple, Q. C., and *Manisty*, Q. C., in support of the rule.—The plaintiff, knowing that if he carries luggage with him, he will have to pay 9*s.* for the journey from Scarborough to Whitby and back, and that, if he chooses to renounce his right to travel with luggage, the company will carry him for 5*s.*, avails himself of the privilege of travelling for the lesser fare. Quilibet potest renunciare juri pro se introducto. The facts clearly show that the plaintiff voluntarily abandoned his right to carry luggage. He knew that, if he carried luggage, he would have to pay 9*s.* for the journey; and he sought to defraud the company of the difference between that sum and the price of an excursion ticket by separating himself from his luggage. It is said that there was no contract with the company to have the portmanteau carried for hire. But they have performed a service for the plaintiff under circumstances which amount to an implied request; and they clearly could have sued him for it. Suppose a man contrives, with a ticket entitling him to travel by an ordinary train, to get himself conveyed by an express-train, the charge for which is higher, might not the company sue him for the difference? No man is allowed to take advantage of his own fraud. In M'Cance *v.* The London and North-Western Railway Company, 7 Hurlst. & N. 477, the first count of the declaration alleged that the plaintiff employed the defendants to provide trucks for the carriage of the plaintiff's horses, for hire to be paid by the plaintiff, in consideration whereof the defendants promised the plaintiff that the trucks should be reasonably *647] fit and proper for the carriage of such horses: breach, that *the defendants did not provide fit and proper trucks, whereby the plaintiff's horses were injured. The second count stated that the defendants having received certain horses of the plaintiff to be carried by railway, in consequence of the defective state of the truck, and the negligence and want of care of the defendants, the plaintiff's horses were injured. The defendants paid 25*l.* into court, and the plaintiff replied damages ultrà. At the trial it appeared, that, when the plaintiff delivered the horses to the defendants, he signed at their request a declaration that the value did not exceed 10*l.* per horse, and that, in consideration of the rate charged for their conveyance, he thereby agreed that the same were to be carried entirely at the owner's risk. In the course of the journey the horses were injured in consequence of the defective state of the truck in which they were carried. The horses were worth more than 10*l.* each; and, if taken at their real value, the damage sustained by the plaintiff was 65*l.*, but, if valued at 10*l.* each, the 25*l.* paid into court covered the plaintiff's claim. A verdict having been entered for the plaintiff for 40*l.*, on motion to enter the verdict for the defendants, the court being at liberty to draw inferences of fact,—it was held, that, the plaintiff having made a wilfully false statement as to the value of the horses, for the purpose of inducing, and having thereby induced, the defendants to enter into the contract, was not at liberty to show their real value, in order to obtain compensation above the sum paid into court. [WILLIAMS, J.—To entitle you to succeed in your defence, must you not show an implied contract with the company that they should carry the portmanteau for hire?] The facts abundantly sustain such an implied contract. Suppose the plaintiff, having got his portmanteau placed in

the luggage-van, had departed without taking a ticket at all, and had afterwards presented himself at the station at Whitby and [*648 demanded it, could it for a moment be contended that the company were not entitled to demand the price of the carriage? And, if there would be an implied contract in that case, there can be no reason why there should not be here.

ERLE, C. J.—I am of opinion that this rule should be made absolute. The plaintiff, it appears, was going from Scarborough to Whitby by the defendants' railway, and was desirous of taking his luggage, consisting of a portmanteau, which may be assumed to have contained that which is ordinarily called personal luggage, with him as far as Malton, where he proposed to leave it in order that he might take it up again on his road to York, which was his place of ultimate destination. It was known at Scarborough (and the plaintiff admitted that he had seen the announcement) that the price of a first-class day-ticket from Scarborough to Whitby, which would include the right to carry luggage, was 9*s.*; but that, if the passenger was content to dispense with luggage, he might have an "excursion-ticket" for 5*s.* The plaintiff having got his portmanteau put into the luggage-van, went into the booking-office and obtained a 5*s.* ticket, by which he held out to the company that he wished to be carried as an excursionist, without the encumbrance of luggage. On the arrival of the train at Malton, the plaintiff requested the guard to leave the portmanteau there; but this the guard refused to do, inasmuch as it was not booked: and, on arrival of the train at Whitby, the company's servants demanded 3*s.* 1*d.* for the carriage of the portmanteau, which the plaintiff refused to pay, and thereupon they detained the portmanteau. The learned judge who tried the cause, having before him the 39th section of the company's act, 17 & 18 Vict. c. ccxi., which enacts that "every passenger [*649 travelling upon the said railways may take with him his ordinary luggage, not exceeding 150 lbs. in weight for first-class passengers, and 100 lbs. in weight for second and third-class passengers, without any extra charge being made for the carriage thereof," thought that the words "every passenger" were to be taken in their literal sense, and therefore that one who came and in consideration of a reduced fare renounced the right to carry luggage with him, but who had surreptitiously put his luggage into the train, might still at the end of the journey insist upon the right which that section gives to a first-class passenger. Such was the opinion of that very learned judge. But, with all deference to him, I cannot assent to the proposition. I think the 39th section must be taken to mean, every passenger choosing to claim that right in the first instance, not every passenger who by a pretended renunciation of the right induces the company to carry him at a reduced rate. It is undoubtedly competent to any man to renounce a privilege which is given to him by a statute.(*a*) The plaintiff is, as it seems to me, in the same situation as he would have been in, if, having got a 9*s.* ticket, he had gone back to the clerk and got him to exchange it for a 5*s.* excursion-ticket, on his agreeing to go without luggage, and had then, without the knowledge of the company's servants, put his portmanteau into the van again. I think it is of great importance that no encouragement should be given to

(*a*) See Markham v. Stanford, antè, p. 376.

those who consider the laws of truth and honesty not obligatory upon them when dealing with railway companies. If, then, it was competent to the plaintiff in this case to renounce his right to have his *650] luggage carried with him, do the circumstances *create a right in the company to charge him for the carriage of it? Although he intended to have it carried gratis, do the facts raise an implied promise on his part to pay them a reasonable sum for the carriage of it? I am of opinion, that, although the circumstances created no obligation on the company to carry the portmanteau safely, so as to render them liable if it had been lost on the journey,—as in the case where a passenger has palmed off merchandise as personal luggage,—still it by no means follows that a party who thus uses the services of the company is not bound to pay for them what they are reasonably worth. I take it to be a wide general principle that you need not have an express contract to create an obligation to pay for goods delivered or services performed; but, where these have been obtained by means of deception, the law will imply a contract to pay what is usual and reasonable. In Chitty on Contracts, 7th edit. 19, it is said: "The general rule as to the sufficiency of the consideration seems to be, that it may arise either,—first by reason of a *benefit* resulting to the party promising, or to a third person, by the act of the promisee,—or, secondly, by reason of the latter sustaining any *loss or inconvenience*, or subjecting himself to any *charge or obligation*, however small the benefit, charge, or inconvenience may be; provided such act be performed, or such inconvenience or charge incurred, with the consent, express or implied, of the promiser, or, in the language of pleading, *at his request*." That is sound law. Under ordinary circumstances, the charge for the carriage of a package like this from Scarborough to Whitby would be 3*s.* 1*d.* The plaintiff caused that service to be performed for him, although he intended to have it performed without payment. According to the law which is clearly laid down in Scarfe *v.* Morgan, 4 M. & W. 270, I think the company were entitled to *651] *insist upon their lien. But it is said that they claimed too much, and that the excessive claim is a waiver of their right. They claimed 3*s.* 1*d.*, being 2*s.* for the carriage from Scarborough to Malton, and 1*s.* 1*d.* from the latter place to Whitby; and, inasmuch as the portmanteau was carried the latter distance against the plaintiff's will, it is said that the company are not entitled to charge for it. But I am of opinion that these may be considered as two separate claims; and the plaintiff was not entitled to have back his portmanteau until he had tendered what the company were lawfully entitled to claim. Further, I am of opinion, that, when the train arrived at Malton, the guard did his duty to the company when he refused to allow the portmanteau to be left there at the risk of the company, and told the plaintiff, that, as he had brought it as luggage, it must go on with him. On the arrival of the portmanteau at Whitby, I think the company were perfectly justified in detaining it until paid for its carriage the whole distance. The rule must be absolute for a new trial.

WILLIAMS, J.—I am of the same opinion. The first question is, whether the conditions upon which these excursion-trains are conducted can be enforced or not. The company agree to carry passengers on very reduced terms, upon condition that no luggage is taken.

I see nothing in the company's act, or any principle of public policy, which prevents a passenger from consenting to give up his right to carry luggage with him free of charge, in consideration of the reduced fare: and there was unquestionably evidence for the jury here that such a bargain was made. Then comes the question whether the company acquired any right of lien by carrying the plaintiff's portmanteau under the circumstances stated. I think they did. There was *evidence to go to the jury that the plaintiff intended to defraud the company of part of the ordinary fare, by travelling as an ordinary passenger with an excursion-ticket. He was, therefore, precisely in the same condition as a man who under the false pretence of being a passenger when he is not, gets his portmanteau carried to its destination as passenger's luggage. The question is, whether the company may not under those circumstances act upon the principle that the fraud of the plaintiff was equivalent to a request to carry the portmanteau for hire. I think that principle is precisely applicable. There are numerous cases in the books upon the subject. In Roscoe on Evidence, 10th edit. 372, it is said: "In some cases, where goods have been wrongfully taken, the plaintiff may waive the tort, and sue on the implied contract. Thus, where the defendant by fraud procured the plaintiff to sell goods to an insolvent, and afterwards got them into his own possession, he was held liable in an action for goods sold: Hill *v.* Parrot, 3 Taunt. 274. So, where a father fraudulently represented that he was about to relinquish his business in favour of his son, to whom (being a minor) goods were upon such representation supplied, which the father took into his own hands, he was held liable for goods sold and delivered: Biddle *v.* Levy, 1 Stark. 20; Read *v.* Hutchinson, 3 Campb. 352." For these reasons, I think the company were at liberty to treat this as a case where they had carried the portmanteau for hire, and were justified in claiming a lien on it for the price of the carriage. The only question remaining, is, whether the circumstance of the portmanteau having been carried a part of the journey without the concurrence of the plaintiff, prevented the company from insisting on a lien for the carriage for the whole distance. Assuming that the company had only a right to charge for the carriage to Malton, *where the plaintiff required it to be left, there was no offer to pay, no intimation that the plaintiff was ready to pay for the carriage to that place. The point attempted to be made, therefore, does not properly arise. I think it should have been left to the jury to say whether, under the circumstances, the plaintiff had not been guilty of fraud; and, if so, the company were clearly entitled to insist upon their lien in respect of the carriage for the whole journey.

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WILLES, J.—I am of the same opinion. The only doubt I have entertained is upon the 89th section of the company's act, whether it was not the intention of the legislature that every passenger under any circumstances should have a right to the free carriage of a given quantity of luggage. But, upon consideration, I do not think the statute will bear that construction. The only person intended to be benefited by that provision is the passenger: he is to be taken to have paid in the fare a compensation to the company for carrying his luggage. But, as that is a right which is conferred upon the passenger

for his benefit exclusively, he may agree to sell that right to the company, and so become a passenger without the right to carry luggage. The portmanteau in question, not being carried as passengers' luggage, was subject to toll under the 37th section. It being carried with the plaintiff's consent, the company were entitled to toll without any express contract. The plaintiff cannot be heard to say, that, though carried with his consent, he did not contract to pay for the carriage. No man is allowed to take advantage of his own wrong: far less of his wrong intention which is not expressed. If entitled to toll, the company are entitled to a lien by the express words of the act. Whether or not the company were entitled to insist upon the whole toll to Whitby,—as I think *they were,—the claim made at Malton to a guard who had no authority, was like a claim by a freighter to have back his goods after the commencement of the voyage without payment of freight. I think the company were right in all they did. But, if they were only entitled to claim in respect of the carriage to Malton, I am of opinion, upon the authority of Allen v. Smith, 12 C. B. N. S. 638 (E. C. L. R. vol. 104), that they were not bound to part with the portmanteau until the proper amount had been tendered to them. This obliges us to come back to the construction of the 39th section; and upon that, I think, the direction of the learned judge cannot be sustained.

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BYLES, J.—I am entirely of the same opinion: and I cannot usefully add anything to that which has fallen from the other members of the court. Rule absolute.

PATRICK M'INTYRE the Elder and Another v. BELCHER.

June 5.

By an agreement for the sale of the goodwill of a medical practice, it was stipulated that the purchaser should have delivered up to him possession of the house, and have sold to him the horse, drugs, bottles, and surgical instruments and furniture employed in the business, at the sum of 17*l.* 5*s.*: and the vendors agreed with the purchaser to pay rent and taxes up to a given day, and that they would not within ten years from the date of the agreement practise, &c., at or within ten miles of the place: and the purchaser agreed that he would, on condition of the premises, pay the vendors for and in respect of each of the successive years ending the 31st of December, 1860, 1861, 1862, and 1863, if he should be living at the end of each respective year, one-fourth part of the earnings and receipts in respect of the said practice, without any deduction for expenses,—provided the earnings and receipts in each year should amount to 300*l.*

In an action upon this agreement, the breach alleged was that the defendant, since the making of the agreement, and during and before the expiration of the third of the said years, to wit, the year 1862, had by his own acts and defaults wholly disabled and incapacitated himself from further carrying on the said business and from getting or obtaining any further earnings or receipts therefrom, and had never since carried on the said business or obtained any further earnings or receipts therefrom:—Held, that it was an implied covenant in the agreement, that the purchaser would not during the four years by his wilful acts or default prevent the receipt of earnings; and consequently that the breach was well assigned.

THE declaration stated, that, by certain articles of agreement, dated the 13th of December, 1859, the plaintiffs and the defendant agreed together that the *goodwill of the practice of a surgeon then lately carried on by one Patrick M'Intyre the younger should be transferred to the defendant, who should be recommended to the patients of the said business by such usual and proper means as he

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should desire, and have underlet and given up to him possession of the house where such practice had been carried on, and have sold to him the horse, drugs, and bottles, and surgical instruments and furniture employed in the said business, at the sum of 17*l.* 5*s.*: And the plaintiffs further agreed with the defendant to pay the rent, rates, and taxes of the said house up to the 6th of January then next, and that the said Patrick M'Intyre should not within ten years from the date of the said agreement practise as a surgeon and apothecary or physician at Woolpet or within ten miles from the same: And the defendant thereby agreed with the plaintiffs that he would, on condition of the premises, pay the plaintiff for and in respect of each of the successive years ending the 31st day of December, 1860, the 31st day of December, 1861, the 31st day of December, 1862, and the 31st day of December, 1863, *if he should be living at the end of each respective year*, one-fourth part of the earnings and receipts in respect of the said practice, without any deduction for expenses, such one-fourth part to be paid on or before the 1st day of April next after the end of the year in respect of which it should be due as aforesaid: Provided always, that, in case the earnings and receipts of the said defendant in respect of the said practice, without deducting any expenses, in any of the said four years, should be less *than the sum of 300*l.*, then the said defendant, his executors or administrators, should [*656 not be required to make any payment in respect of those years: Averment, that, although all things had been done and happened, and all times elapsed, necessary to entitle the plaintiffs to have the said agreement performed by the defendant, yet the defendant, since the making of the said agreement, and during and before the expiration of the third of the said years, to wit, the year 1862, had by his own acts and default wholly disabled and incapacitated himself from further carrying on the said business, and from getting or obtaining any further earnings or receipts therefrom, and had never since carried on the said business or obtained any further earnings or receipts therefrom, contrary to the said agreement in that behalf.

To this declaration the defendant demurred, the ground of demurrer stated in the margin being, "that the promise alleged in the declaration does not support the breach." Joinder.

W. G. Harrison, in support of the demurrer.—There is no express promise on the part of the defendant that he will continue to carry on the business. It is well settled that the promise to do something which is collateral or ancillary to a principal act, does not amount to a covenant to do the principal act. Was the defendant bound to carry on the business for the whole four years, though he could make no profit of it? The mere contemplation that the business will be carried on, is not enough: Aspdin *v.* Austin, 5 Q. B. 671 (E. C. L. R. vol. 48), D. & Meriv. 515; Dunn *v.* Sayles, 5 Q. B. 685, D. & Meriv. 519. In Aspdin *v.* Austin, Lord Denman, in delivering the judgment of the court,—after referring to Sampson *v.* Easterby, 9 B. & C. 505 (E. C. L. R. vol. 17), 4 M. & R. 422, affirmed in the Exchequer Chamber, Easterby *v.* *Sampson, 6 Bingh. 644 (E. C. L. R. vol. 19), 4 M. [*657 & P. 601, and Saltoun *v.* Houstoun, 1 Bingh. 433 (E. C. L. R. vol. 8),—says: "It will be found in those cases, that, where words of recital or reference manifested a clear intention that the parties should

do certain acts, the courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the non-performance, as if the instruments had contained express covenants to perform them. But it is a manifest extension of that principle to hold, that, where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act convenient or even necessary for the perfect performance of their express covenants. Where parties have entered into written engagements with express stipulations, it is manifestly not desirable to extend them by any implications: the presumption is, that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect: and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as upon a full consideration the court may deem fitting for completing the intentions of the parties, but which they, either purposely or unintentionally, have omitted." [BYLES, J.—Here, the sum to be paid cannot be ascertained. The cases you refer to are cases of master and servant, where a sum certain was stipulated to be paid. ERLE, C. J.—Those cases were very much considered in Elderton *v.* Emmens, 4 C. B. 498 (E. C. L. R. vol. 56), 6 C. B. 160 (E. C. L. R. vol. 60), and in Emmens *v.* Elderton, *658] 13 C. B. 495 (E. C. L. R. vol. 76). In Rashleigh *v.* The Eastern Counties Railway Company, 10 C. B. 612 (E. C. L. R. vol. 70), a declaration in covenant recited a deed of the 2d of March, 1841, whereby two pieces of land were conveyed to the defendants, subject to the performance by them of certain agreements: in this deed the piece of land in question was described as "a slip of land then being intended to be formed into a new course for the river Beult." The declaration then made profert of the deed of covenant upon which the action was brought, and stated that the defendants thereby covenated with the plaintiffs, that they the defendants should and would within a reasonable time, "at their own costs and expense, make and cut the said intended new course for the said river Beult, and also, within such like reasonable time as aforesaid, divert the stream of the said river into the said intended new course for the same." It then went on to state a covenant to make a bridge over the intended new cut, for the plaintiff's use, within a given time, and a covenant to make good the banks of the new cut, and, after the same should have been so made good, and the railway completed, to re-convey to A. (one of the plaintiffs) the slip of land which should form the new course of the river, and also to fill up and level the then-existing course, so far as the same should have been diverted. The declaration then charged breaches of covenant, in not making a new cut, in not diverting the stream of the Beult, in not constructing a bridge over the new cut, in not perfecting its banks, in not re-conveying to A. the slip of land "with the water of the said river duly diverted into the said new course," and in not filling up the existing course of the Beult, "so

far as the stream thereof should and ought to have been diverted as aforesaid." The defendants, after craving oyer of the *deed of covenant, and setting it out in hæc verba, demurred generally to the declaration. The deed, as set out on oyer, did not in express terms contain any covenant to make and cut the new course, or to divert the stream of the river; but it did contain express covenants to the effect of all the other covenants stated in the declaration. It was held that there was no implied covenant on the part of the defendants to make the cut and divert the stream of the Beult; and, consequently, that there could be no breach of the *express* covenants, to build the bridge, &c., unless the cut *was* made and the stream diverted. Maule, J., in delivering the judgment of the court, says: "It was argued that the several covenants by which the defendants bound themselves to do certain things (as, to build a bridge over the new cut, and fill up the old course of the stream after it had been diverted, and to re-convey the slip forming the new course of the river), which are incidental to, or to be done after, the new cut is made and the stream diverted, being in their terms absolute, and not conditional on the making of the new cut and diversion of the stream, show a clear intention that the defendants meant to bind themselves to do that principal act of making the cut and diverting the stream, to which the things which they in express terms absolutely covenanted to do were incidental. But we think that such an intention cannot properly be inferred: the true inference, as it appears to us, is, that the parties to the deed both of them expected that the new cut would be made, and the stream diverted, and entered into the contract in question under that expectation,—treating it as a thing that was certain to take place, and providing for that event only: but it by no means follows from this state of things that the parties intended that the defendants should bind themselves by the *deed to make the cut, and divert the stream, any more than a covenant to lay down the permanent rails, or to complete the railway, is to be inferred from the covenants to do certain things after those events. No reason has been suggested, why, if the defendants were really intended to be bound as the plaintiffs contend, in a deed of which the sole object is to express the covenants by which the defendants were to be bound to the plaintiffs, the principal thing to be done by the defendants should be left to implication, and the incidental matters minutely provided for. If the event which has taken place, viz. the abandonment by the defendants of their intention to divert the stream, had been contemplated by the parties, it is very improbable that they would have provided for it by a covenant compelling the defendants to do that which they no longer considered beneficial or proper for their works. Such a state of things would have rather been the subject of special provisions, for the benefit of the plaintiffs, applicable to it. Such a state of things, it appears to us, was either not contemplated at all, or, if contemplated, was thought so improbable as not to be worth providing for; the parties being content, in such an event, to adjust their rights as they might be able, by agreement, or to leave them to be arranged by a competent tribunal." That case is relied on by Cockburn, C. J., in Smith *v.* The Mayor, &c., of Harwich, 2 C. B. N. S. 651. [WILLES, J., referred to Harrison *v.* The Great Northern Railway

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Company, 11 C. B. 815 (E. C. L. R. vol. 73), affirmed on error, The Great Northern Railway Company v. Harrison, 12 C. B. 576 (E. C. L. R. vol. 74).] It is highly probable that the parties contemplated that the business would continue to be carried on: but, what is there to compel the defendant to carry it on to his ruin? In James v. Cochrane, 7 Exch. 170, 177, Parke, B., says: "According to the rule of law on this subject,—and *the whole case turns upon the application of that rule,—no precise words are necessary to constitute a covenant; provided we are able to collect an agreement by the parties that a certain thing shall be done, that will be sufficient to enable us to say that a covenant is created. But we must be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done." If any promise is to be implied here, it must be to carry on the business with care and skill. That clearly would be unreasonable. Suppose the defendant were incapacitated by the act of God; or suppose he sustains such an injury by negligently getting into or out of a railway carriage as to become permanently disabled: would he be liable in either of those cases to be sued for a breach of his implied covenant? [ERLE, C. J.—It must mean that he will not *wilfully* incapacitate himself from carrying on the business.] It is quite consistent with this declaration, that the defendant, though personally incapacitated, is carrying on the business by an agent.

*662] *Shiel*, contrà.(a)—The agreement declared on *contains an implied covenant on the part of the defendant to carry on the business at all events until the end of the year 1863: and the breach, it is submitted, is well assigned. In Aspdin v. Austin, the court say, that, where there is a clear manifestation of intention that a certain act shall be done, a contract or covenant to do it will be implied. Here, the plaintiff could derive no benefit from the contract unless it amounts to an engagement on the part of the defendant to carry on the business. Whittle, app., Frankland, resp., 31 Law J. M. C. 81, is a strong authority for the plaintiff. An agreement was entered into between W. and B. on behalf of himself and partners, whereby W., in consideration of wages to be paid to him fortnightly by the firm, agreed to serve them exclusively as a collier, from the date of the agreement until the expiration of any notice thereinafter mentioned, and not to leave the service without giving twenty-eight days' notice, nor until after the expiration of such notice; and the firm, in consideration of such faithful service, agreed that W. should not be discharged by them without twenty-eight days' notice. Upon an information laid against W. under the 4 G. 4, c. 34, s. 3, for absenting himself from the service

(a) The points marked for argument on the part of the plaintiff were as follows:—

"1. That it must be implied from the contract as set forth in the declaration that the defendant placed himself under an obligation or undertook to do no act, and to be guilty of no default, whereby the mode of payment to the plaintiff fixed by the contract should become impossible:

"2. That the allegation that the defendant has never since carried on the business included the fact that he has neither carried it on in person or by the agency of another, even if it can be said that by the contract he was and is entitled to carry it on by another:

"3. That the allegation that the defendant by his own acts and defaults disabled himself from carrying on the business, is sufficient to charge him."

without lawful excuse, it was contended before the justices, amongst other things, that the contract was void for want of mutuality, inasmuch as it did not bind the masters to find work for W. or pay him wages. The magistrate, however, convicted him. Upon an appeal under the 20 and 21 Vict. c. 43, Cockburn, C. J., said: "The agreement by the appellant is, to serve the company faithfully and exclusively as their servant from the date of the agreement until the expiration of twenty-eight days' notice, and obey their lawful commands; and, on the part of the employers, the agreement is, that they will pay him wages fortnightly, and not discharge him without twenty-eight *days' notice. There is no *express* agreement that they [*663 will find him work; but that arises by necessary implication from the above two stipulations. The agreement would be perfectly illusory on the part of the employers if they could say, that, though they were obliged to keep him in their employ, they were yet not bound to supply work. The objection, therefore, as to want of mutuality fails."

Harrison, in reply:—The argument on the other side assumes that the promise to pay a fourth part of the earnings of the business was the whole consideration; whereas, that is only collateral: the real consideration was, the payment of 17*l.* 5*s.* for the bottles, drugs, &c. Whittle, app., Frankland, resp., was a case of express contract.

ERLE, C. J.—I am of opinion that our judgment must be for the plaintiffs. We are bound to give effect to all contracts according to the language of the instrument and the nature of the transaction. The agreement here is, that the goodwill of the practice of a surgeon then lately carried on by one P. should be transferred to the defendant, with possession of the house, and the defendant was to have sold to him the drugs, instruments, and furniture employed in the business for 17*l.* 5*s.*, the plaintiffs engaging to pay rent and taxes up to a certain day, and that P. should not within ten years from the date of the agreement practise as a surgeon, &c., at or within ten miles of the place; and the defendant agreed that he would, on condition of the premises, pay the plaintiffs, in respect of each of four successive years ending, &c., *if he should be living at the end of each respective year*, one-fourth part of the earnings and receipts in respect of the said practice, without any deduction for expenses. The *breach assigned is, [*664 that the defendant, having been let into possession, has by his own acts and default wholly disabled and incapacitated himself from further carrying on the said business, and from getting or obtaining any further earnings or receipts therefrom, and has never since carried on the said business or obtained any further earnings or receipts therefrom, contrary to the agreement in that behalf. The substance of that is, that he has wilfully chosen to destroy the goodwill. Is that a breach of the agreement? I think it is necessarily implied from the stipulations in the agreement that the defendant would take common and ordinary care so to carry on the business as to realize receipts. And a wilful omission so to do renders him liable to an action.

WILLIAMS, J.—I am of the same opinion. In cases of this sort, the court should be cautious not to infringe the golden rule, that contracts are to be construed, not by what one feels would be right, but by

what is expressed in or is necessarily to be implied from the language of the parties. Looking at this agreement, although it is true there is no express contract on the part of the defendant to carry on the business for the four years, I think such a contract may be fairly implied. It is upon the same principle that a covenant for quiet enjoyment is implied from the word "demise."

WILLES, J.—I am of the same opinion. The nature of the stipulated payments is such that it is necessary that the business should continue to be carried on during the four years. By wilfully incapacitating himself from doing so, the defendant clearly breaks his contract. As, if I grant a man all the apples growing upon a certain tree, and I cut down the tree, I am guilty of a breach.

*665] *BYLES, J.—I am of the same opinion. The consideration consists of three parts,—the sale of the drugs and furniture, &c., to the defendant for 17*l.* 5*s.*,—the relinquishment of the practice by P.,—and the engagement that he shall not carry on business as a surgeon, &c., for ten years within ten miles of the place. The only substantial consideration for that is, his contingent chance of surplus profits for the period of four years. It seems to me that a contract on the defendant's part that he will not wilfully incapacitate himself from carrying on the business so as to earn profits, is necessarily implied. I therefore think the breach is well laid.

Judgment for the plaintiffs.

ILDERTON v. JEWELL and COLLIN. *June* 5.

A certificate given under s. 198 of the Bankruptcy Act, 1861, of the filing of a deed under s. 192, which deed has been held to be void, affords no protection to bail who have undertaken to render the debtor in the Mayor's Court, London.

THIS was an action against bail, commenced in the Mayor's Court, London, and removed into this court.

The declaration stated that the defendants, on the 9th of February, 1861, and in the 24th year of the reign of her Majesty the now Queen, and within the jurisdiction of the said (Mayor's) court, came into the said court in their own proper persons, and became pledge and bail for one Louis Castrique, that, if the said Louis Castrique should happen to be convicted at the suit of the said plaintiff in a certain action of debt then depending in the said Mayor's Court of London, by and at the suit of the said plaintiff against the said Louis Castrique, then the defendants, within the jurisdiction aforesaid, consented and agreed that all such moneys as should be adjudged to the plaintiff in that

*666] *behalf should be made of their lands and chattels, and levied to the use of the plaintiff, if it should happen that the said Louis Castrique should not pay unto the plaintiff the said moneys, or be forthcoming at the end of the said action: and although the plaintiff afterwards, to wit, on the 19th of December, 1861, recovered against the said Louis Castrique in the said court in the said action, by the consideration and judgment of the said court, the sum of 126*l.* 1*s.* for debt, and also 2*s.* for his damages which he had sustained as well by means of detaining of the said debt as for his costs and charges

by him about his suit in that behalf expended, whereof the said Louis Castrique was convicted, as by the record and proceedings thereof still remaining in the same court more fully appears; yet the said Louis Castrique had not paid to the plaintiff the said moneys or any part thereof, nor had he been, nor was he, forthcoming at the end of the said action according to the form and effect of the said recognisance; and as well the said recognisance as the said judgment still remained in full force and effect, in nowise satisfied, vacated, or discharged; and the plaintiff had not obtained any execution of the said judgment; whereby and according to the form and effect of the said recognisance an action had accrued to the plaintiff to demand and have of and from the defendants the said sums in form aforesaid recovered; yet the defendants had not, nor had either of them, paid the said sums, or any part thereof.

The defendant Collin pleaded, that, after the recovery of the said judgment in the declaration mentioned, and after the passing of the Bankruptcy Act, 1861, and before the issuing of the writ of capias ad satisfaciendum upon the said judgment as thereinafter mentioned, the said Louis Castrique being a trader indebted to divers persons, there was made and entered *into between the said Louis Cas- [*667
trique and certain of his creditors a certain deed in the words and figures following [setting out the deed which this court in Ilderton *v.* Castrique, antè, p. 99, held not to be a valid deed within the 192d section of the Bankruptcy Act, 1861]: That a majority in number, representing three-fourths in value of the creditors of the said Louis Castrique whose debts respectively amounted to 10*l.* and upwards, did in writing assent to and approve of the said deed; and that the execution of the said deed by the said Louis Castrique was and is attested by T. J. Harwood, an attorney-at-law; and that, within twenty-eight days from the day of the execution of the said deed by Louis Castrique, the said deed was produced and left, having been first duly stamped, at the office of the chief registrar of Her Majesty's Court of Bankruptcy, for the purpose of being registered according to law, and together with such deed there was delivered to the said chief registrar an affidavit made by the said Louis Castrique that a majority in number representing three-fourths in value of the creditors of the said Louis Castrique whose debts amounted to 10*l.* and upwards, had in writing assented to or approved of the said deed: That the dates, names, and descriptions of the parties to the said deed, not including the creditors of the said Louis Castrique, together with a short statement of the nature and effect of the said deed, was entered by the said chief registrar in a book exclusively kept for the purposes of such registration, within forty-eight hours after the said deed was so left as aforesaid, and a copy of such entry was published in the London Gazette within four days after the making of the said entry,—the said entry being in the words and figures following, that is to say, "Notice is hereby given that the following is a copy of an entry made in the book kept by the chief registrar of the Court of Bankruptcy *for the registration of trust-deeds for the benefit [*668
of creditors, composition, and inspectorship deeds executed by a debtor, as required by the Bankruptcy Act, 1861, ss. 187, 192, 194, 196, and 198. Number 649. Title of Deed, '*Composition.*' Date

of deed, '17th January, 1862.' Date of execution by debtor, '3d February, 1862.' Name and description of the debtor as in the deed, 'Louis Castrique, No. 3, Philpot Lane, in the city of London, bill-broker, of the first part.' The names and descriptions of the trustees or other parties to the deed, not including the creditors, 'The creditors of the said Louis Castrique of the second part.' A short statement of the nature of the deed, 'Composition and release, whereby the said Louis Castrique proposes to pay and his said creditors agree to accept a composition of 2*s.* 6*d.* in the pound in full satisfaction and discharge of their debts, to be paid within one month from the execution of the deed by the said Louis Castrique.' When left for registration, '7th February, 1862, at 3 o'clock, afternoon.' (Signed) W. H. Whitehead, chief registrar:" That, within one calendar month from the date and execution of the said deed by the said Louis Castrique, and after the same was assented to or approved of in writing by the said majority of the creditors of the said Louis Castrique as aforesaid, the said Louis Castrique, in pursuance of the said deed, paid or tendered to each and every of his creditors the said composition of 2*s.* 6*d.* in the pound upon the amount of their debts respectively; and the said Louis Castrique also then, in pursuance of the said deed, tendered to the plaintiff the said composition upon the amount of the debt owing by the said Louis Castrique to the plaintiff, to wit, 50*l.*: That afterwards, and before the issuing of the said writ of capias ad satisfaciendum as thereinafter mentioned, the said chief registrar certified under his hand *and the seal of the said Court of Bankruptcy, that the said deed was filed and registered, which said certificate had ever since been and continued to be in full force and effect, and by force of the said Bankruptcy Act, 1861, available to the said Louis Castrique for all purposes as a protection in bankruptcy: That the said writ of capias ad satisfaciendum thereinbefore mentioned was and is a certain writ issued in the said Mayor's Court, according to the course and practice of the said court; and that, except as aforesaid, there had been no writ of execution duly sued out of the said Mayor's Court against the said Louis Castrique upon the said judgment, to have execution thereof: And that the said writ so sued out of the said Mayor's Court as aforesaid was sued out without the leave of the said Court of Bankruptcy, nor had the plaintiff obtained the leave of the said Court of Bankruptcy that the said writ might be available to the plaintiff.

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The defendant Jewell pleaded, that, after the making and coming into operation of the Bankruptcy Act, 1861, and at the time of the execution of the deed by the said Louis Castrique thereinafter mentioned, the said Louis Castrique (not being a bankrupt) was indebted to the plaintiff on the judgment recovered against him as in the declaration mentioned, and to divers other persons, in divers large sums of money; and that, while the said Louis Castrique was so indebted as aforesaid, and after the making and coming into operation of the said act, to wit, on the 17th of January, 1862, and, before the commencement of this suit, and before the issuing of the capias thereinafter mentioned, a certain deed was made and entered into between the said Louis Castrique and certain persons then being and therein respectively described as his creditors, and then executed by the said

Louis Castrique, which said deed was made and entered into [*670
*for the benefit of all the creditors of the said Louis Castrique, and related to the debts and liabilities of the said Louis Castrique, and his release therefrom, and which said deed, together with a schedule thereunder written, and a certain attestation thereon, were in the words and figures following [setting it out as in Collin's plea]: That a majority in number, representing three fourths in value of the said creditors of the said Louis Castrique within the meaning of the said Bankruptcy Act, whose debts respectively amounted to 10*l.* and upwards, did after the execution thereof by the said Louis Castrique, in writing, assent to and approve of the said deed of composition, and the execution of the said deed by the said Louis Castrique was attested by one T. J. Harwood, an attorney and solicitor, and within twenty-eight days from the day of the execution of the said deed of composition by the said Louis Castrique, to wit, on the 7th day of February, 1862, the said deed of composition was produced and left (having been first duly stamped, and bearing the ordinary and ad valorem stamp-duties as provided in the 195th section of the Bankruptcy Act, 1861), at the office of the chief registrar of Her Majesty's Court of Bankruptcy, for the purpose of being registered; and together with the said deed of composition there was then delivered to the chief registrar an affidavit by the said Louis Castrique that a majority in number representing three fourths in value of the said creditors of the said Louis Castrique whose debts amounted to 10*l.* or upwards, had in writing approved of and assented to the said deed of composition, and that the whole of his debts amounted to 5096*l.* 10*s.* 3*d.*, and that a composition thereon at the rate of 2*s.* 6*d.* in the pound amounted to the sum of 637*l.* 1*s.* 3*d.*, being the amount distributable under and comprised in the said deed of composition: That the date, name, and *description of the said Louis Castrique, together with a short [*671
statement of the nature and effect of the said deed of composition, was afterwards and within forty-eight hours after the deed had been left with the registrar as aforesaid, entered by the chief registrar in a book kept exclusively for the purpose of such registration; and afterwards, and within four days after the making of such entry, to wit, on the 11th of February, 1862, a copy of the said entry was published in the London Gazette; and the said deed was within twenty-eight days from and after the execution thereof by the said Louis Castrique, registered in the Court of Bankruptcy; and the said deed of composition, on being so registered, had a memorandum thereof written on the face of the said deed, stating the day and the hour of the day at which the said deed was brought into the said office for registration: That afterwards, and after the said deed was so approved of and assented to as aforesaid, and before the issuing of the said capias as thereinafter mentioned, and before the commencement of this suit, and within one calendar month from the date and execution of the said deed of composition by the said Louis Castrique, to wit, on the 7th of February, 1862, the said Louis Castrique paid or tendered to each of the said creditors of the said Louis Castrique to whom the said Louis Castrique was so indebted as aforesaid the said composition of 2*s.* 6*d.* in the pound upon the amount of their respective debts; and, before the commencement of this suit and the issuing of the said

capias thereinafter mentioned, and within the time last aforesaid, to wit, on the day and year last aforesaid, tendered to the plaintiff a large sum of money, to wit, 50*l.*, being the amount of the said composition of 2*s.* 6*d.* in the pound upon the amount of his said debt, as and for the composition due to the plaintiff, in accordance with the
*672] provisions of the said deed, which *the plaintiff then refused to accept: That afterwards, and before the issuing of the said capias thereinafter mentioned, to wit, on the 13th of February, 1862, a certificate of the filing and registration of the said deed was issued under the hand of W. H. Whitehead, the chief registrar, and under the seal of the Court of Bankruptcy, which said certificate has since continued and now is in full force, and was in the words and figures following:—"The Bankruptcy Act of 1861. This deed or instrument was brought into the office of the chief registrar of the Court of Bankruptcy for registration, on the 7th day of February, 1862, at the hour of 3 of the clock in the afternoon on that day, and was duly registered pursuant to the provisions of the Bankruptcy Act, 1861. T. H. Smith, clerk to the chief registrar:" That, although afterwards, to wit, on the 31st of March, 1862, a writ of capias was issued and prosecuted out of the said Mayor's Court by the plaintiff against the said Louis Castrique upon the said judgment as according to law and the custom and practice of the said Mayor's Court there ought to have been, the same was sued and prosecuted out of the said Mayor's Court after the notice of the filing and registration of the said deed had been given as aforesaid, and after the issuing of the said certificate, and without leave of the Court of Bankruptcy: That, by reason of the premises, the said capias ad satisfaciendum was not and is not available to the plaintiff: And that, save as aforesaid, the plaintiff had not sued or prosecuted out of the said court any capias ad satisfaciendum against the said Louis Castrique upon the said judgment.

The plaintiff demurred to both these pleas, the grounds of demurrer stated, being, "that the deed affords no answer to the action, as the deed is not binding on creditors who are not parties to it." Joinder.

*673] *Joyce*, in support of the demurrer.(*a*)—The court having already held this deed to be void, there remains nothing to argue. Reliance will probably be placed, on the other side, on Thomas *v.* Hudson, 14 M. & M. 353. There, the plaintiff, having obtained judgment against one Foulkes in an action of assault and false imprisonment, sued out a ca. sa., whereon Foulkes was taken and committed to the Queen's prison, of which the defendant was the keeper. Foulkes afterwards petitioned the Court of Bankruptcy for his discharge under the 5 & 6 Vict. c. 116 and 7 & 8 Vict. c. 96, and, having obtained from the commissioner an order for his discharge, was, in

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"1. That the deed set out in the plea affords no answer to the action, as the deed is not binding upon the creditors who are not parties to it:

"2. That, where there is no cessio bonorum on the part of a bankrupt or insolvent, the majority of a body of creditors cannot bind the minority to a composition:

"3. That the pleas do not show that the requisite majority executed the deed; for, the defendants by their pleas may intend a majority of the unsecured creditors:

"4. That non-executing creditors are excluded from the benefit of the deed:

"5. That the deed is unreasonable in its provisions:

"6. That, although the deed may be binding under the bankrupt law as between the parties thereto, it cannot affect strangers."

obedience thereto, discharged by the defendant accordingly. The plaintiff having brought an action against the defendant for an escape, —it was held, that whether this was or was not a debt from which the commissioner had power to discharge the prisoner, the defendant was protected, being bound to obey the order of the commissioner, who was acting judicially in a matter over which he had jurisdiction. That case, however, can have no application here. The certificate of the chief registrar is *not an act of a judicial character, and [*674 cannot avail where the deed itself is void. Even where the bankruptcy is regular, the bail are bound to perform their contract: Payne *v.* Spencer, 6 M. & Selw. 231.

Hodgson, contrà.(*a*)—The court will probably adhere to the decision pronounced by them in Ilderton *v.* Castrique, antè, p. 99. [ERLE, C. J.—I certainly do not recall what I said in that case.] A certificate of registration of a deed under s. 192 of the Bankruptcy Act, 1861, which differs from the deed under s. 194 (see Ex parte Morgan, 32 Law J. Bankruptcy 15), is good until set aside by the Court of Bankruptcy, and protects the insolvent from a ca. sa., and consequently his bail also. The 198th section enacts, that, "after notice of *the [*675 filing and registration of such deed has been given as aforesaid (s. 196), no execution, sequestration, or other process against the debtor's property in respect of any debt, and no process against his person in respect of any debt, other than such process by writ or warrant as may be had against a debtor about to depart out of England, shall be available to any creditor or claimant, without leave of the court; and a certificate of the filing and registration of such deed, under the hand of the chief registrar, and the seal of the court, shall be available to the debtor for all purposes as a protection in bankruptcy." If the deed be invalid, probably the creditor may obtain leave to issue an execution.

ERLE, C. J.—We have already decided that the deed in question is a void deed. A certificate given in respect of a void deed gives no protection. "Such deed" means a valid deed. The certificate is as void as the deed itself.

WILLIAMS, J.—I am of the same opinion. Even if the deed were good, I doubt whether it would exonerate the bail.

The rest of the court concurring, Judgment for the plaintiff.

(*a*) The points marked for argument on the part of the defendants were as follows:—

"1. That the defendants are sued as sureties, and the deed for the benefit of the creditors of the principal debtor, Castrique, set out in the plea, is binding on the plaintiff under the Bankruptcy Act, 1861, s. 192:

"2. That the plea shows that Castrique duly performed all the conditions required by the said deed, so as to entitle himself to the benefit thereof:

"3. That, after notice of the filing and registration of the said deed under the Bankruptcy Act, 1861, no writ of execution could be executed against Castrique without leave of the Court of Bankruptcy; that no leave was obtained; and that, before the defendants could be fixed as bail, the plaintiff was bound to have issued an available writ of execution against the said Castrique:

"4. That the certificate of the filing and registration of such deed given to Castrique under the Bankruptcy Act, 1861, s. 198, was thereby available to Castrique for all purposes as a protection in bankruptcy, and could only be set aside by a superior tribunal:

"5. That, in granting the said certificate, the registrar of the Court of Bankruptcy acted judicially; and the defendants could not be compelled to incur the risk of arresting Castrique, in defiance of the protection accorded to him by the said certificate."

*676] *MATHER and WIFE *v.* THE NATIONAL ASSURANCE AND INVESTMENT ASSOCIATION,—Re HENRY CLARK. *May* 28.

The court will not allow a sci. fa. to go against one as a shareholder in a joint-stock company unless reasonably satisfied that he actually *is* a shareholder.

***Quære*, whether a sci. fa. can be granted to one who from the constitution of the association is a partner therein.**

DALY, in Easter Term last, obtained a rule calling upon one Henry Clark to show cause why a writ or writs of scire facias on the judgment obtained by the plaintiffs in this cause should not be issued forth against him as a member of the National Assurance and Investment Association at the time when the contract was entered into upon which this action was brought, and having so continued, and still being a member of the said association, to enable the plaintiffs to have execution upon the said judgment, pursuant to the statute 17 Vict. c. 43, s. xii.(*a*)

*677] *The affidavit upon which the rule was obtained, stated that the action was brought by the plaintiffs to recover 204*l.* 13*s.* 4*d.*, as the holders of two deposit-notes or certificates signed by H. Clark and N. Dennys, two of the directors of the above-named association, lately of No. 3, Pall Mall East, St. James's, in the county of Middlesex; that, at the time of the commencement of the action, the deponent believed, from inquiries made by him, that there was not any place of business, nor any managing director of the said association, and he had been informed that the managing director had absconded, and that the affairs of the said association had been or were being wound up under the direction of the Court of Chancery, all which he believed to be true; that, on the 6th of July last, a writ of summons was issued against the defendants, which was on the 8th served upon Nicholas Dennys, one of the said directors, in manner directed by the special act 17 Vict. c. xliii., s. 7; that, no appearance being entered to such writ, judgment was signed against the company on the 9th of August

(*a*) Which enacts that "every judgment, decree, or order of any court of justice which has been or shall at any time be recovered or obtained in any action, suit, or proceeding commenced, instituted, or prosecuted under or by virtue of this act against the association, may be lawfully executed, not only against the estate, funds, and property of the said association, but also, if due diligence shall have been used to obtain satisfaction of such judgment, decree, or order, by execution or diligence against the property and effects of the association, then against the person, estate, funds, and property of every member of the association in his natural capacity, until such judgment, decree, or order shall be satisfied; and, in case due diligence shall have been used in obtaining satisfaction of any such judgment, decree, or order, by the means aforesaid, but without effect, then and in such case the same may be lawfully executed against the person, estate, funds, and property of any person who was a member of the association at the time the contract was entered into upon which such action, suit, or proceeding shall have been instituted; but no such execution against any person having ceased to be a member shall be issued without leave first granted by the court in which such judgment, decree, or order shall have been obtained, upon motion in open court, and after notice of such motion given to the person sought to be charged: Provided always that nothing in this act shall enable any person to recover from any existing or former member of the association, or any other person, any other or greater sum than might have been recovered from such member or other person, as the case may be, if this act had not been passed; and nothing in this act shall be deemed or construed to render any existing or former member liable to have his person or property taken in execution, or to pay any sum of money, in any case in which he would not have been so liable in case this act had not been passed."

for 208*l.* 13*s.* 4*d.*, and a fi. fa. issued thereon upon the 5th of September, which was returned nulla bona; that the judgment remained wholly unsatisfied; and that Henry *Clark, of Southampton, [*678 was a member of the said association at the time the said contract was entered into with the plaintiff, and had so continued and was then a member of the said association, as the deponent was informed and verily believed.

Digby Seymour, Q. C., and *L. Temple*, now showed cause, upon affidavits by Henry Clark and by the managing clerk to his solicitor. Henry Clark's affidavit was in substance as follows:—It is not true that I was a member of the said association at the time the said contract was entered into with the plaintiffs herein, nor that I continued so to be, nor that I am a member thereof. Towards the end of the year 1859, Peter Morrison, who was then the managing director of the said association, and to whom I was known, requested me to join the board of directors, and, upon his so requesting me, I asked him whether any qualification was necessary, and whether I should incur any liability, and he told me that none was necessary, and that I should not incur any liability of any sort. Peter Morrison did not then or at any other time tell me that there was any deed of settlement of the said association, nor was I aware of the fact that there was such a deed until the said association was in the course of being wound up, nor did I ever see the said deed or any copy thereof, nor know nor have the means of knowing the contents thereof, until I obtained a copy of the same from the solicitors acting in the winding up of the said association, for the purpose of answering this motion. I never executed the said deed, nor any duplicate thereof. I never at any time effected any assurance with the said association on the life of myself or any other person, for any time, on any condition, or in any manner; nor have I ever been, nor am I now, the holder or proprietor of any stock or share of *or in the said association. [*679 I never have voted nor in any way acted as a member of the said association, except in so far as that I attended certain board meetings of the directors at the request of the said Peter Morrison as hereinbefore deposed, and I did so upon the express understanding with the said Peter Morrison that no qualification was necessary for my so doing, and that I should not be incurring any liability whatever from so doing. I have never been qualified to act as a director, and, had I been informed that any qualification was necessary, I should have refused to qualify to act as a director, and would not have so qualified or acted. To the best of my belief my name has never been entered nor has appeared nor appears in any book of the said association, nor in any register or return made to the registrar of joint-stock companies, under the statute in that case made and provided, as a member of the said association in respect of my being a holder of any policy or stock therein, nor as a shareholder or partner. I have never been put nor sought to be put upon the list of contributories under the said winding-up of the said association, for the reason, as I verily believe, that there never has been and is not the slightest pretence for contending that I am liable to be upon the said list in respect of my ever having been a member, stockholder, shareholder, or partner of or in the said association. To the best of my knowledge and belief

no memorial was ever enrolled, in pursuance of the 19th section of the act referred to in the said rule, of my having been appointed a new director, nor was I ever so appointed except so far as that I attended the board meetings at the request of the said Peter Morrison, as above deposed to. The claim of the plaintiffs is in respect of their
*680] being holders of certain mutual stock of the *said association, represented by the two deposit-notes mentioned in the first paragraph of the affidavit on which the rule was obtained, and not otherwise; and I am advised and verily believe that the plaintiffs as such holders are, or one of them is, members or a member of the said association.

The other affidavit stated, that, on the 16th of November, 1861, an order absolute of the Court of Chancery was made by the Master of the Rolls in the matter of The Joint-Stock Companies Winding-up Acts, 1848 (11 & 12 Vict. c. 45), 1849 (12 & 13 Vict. c. 108), and of the Joint-Stock Companies Winding-up Amendment Act, 1857 (20 & 21 Vict. c. 78), and of the said National Assurance and Investment Association, for winding up the said association under the provisions of the said acts, and that the said association has never been adjudicated bankrupt; that an official manager and creditors' representatives had been duly appointed; that no proceedings whatever had been taken by the plaintiffs against the official manager; and that leave had never been applied for nor granted to the plaintiff or to any one on his behalf by the Master of the Rolls for the commencement or prosecution of the proceedings in question.

The learned counsel submitted that the affidavit of Clark completely negatived the fact of his being a shareholder; that the plaintiffs were precluded by the 7th section of the 20 & 21 Vict. c. 78 from suing at law without leave of the judge or master,—Thompson *v.* The Universal Salvage Company, 3 Exch. 310; and that they were disqualified from suing at law, by reason of their being partners in the concern.

Daly, in support of his rule, submitted, on the authority of The Bank of England *v.* Johnson, 3 Exch. 598, and Clowes *v.* Brettell, 11
*681] M. & W. 461, 2 Dowl. *N. S. 1020, that the court will not decide on motion whether a party is a shareholder or not, when there is a doubt upon the point, but will leave the question to be tried on the sci. fa.

ERLE, C. J.—We are all satisfied that there is not enough before us to show any reasonable ground for believing that Clark is or ever was a shareholder in this association. And, as at present advised, I incline to think that the last objection is also a fatal one.

BYLES, J.—There is no evidence whatever that Clark was a shareholder.

The rest of the court concurring,

Rule discharged, with costs.(*a*)

(*a*) And see Edwards *v.* The Kilkenny and Great Southern and Western Railway Company, antè, p. 526.

GREEN *v.* BARTLETT. *May* 30.

An auctioneer and estate agent was employed to sell an estate, under an agreement by which he was to receive a commission of 2½ per cent. "if the estate should be sold," and, "in case the estate should not be sold," he was to be paid 25*l.* as a compensation for his trouble and expense. Having put up the estate to auction, and failed to sell it, the agent, being asked by a person who had attended the sale who was the owner of the property, referred him to his principal; and ultimately that person, without any further intervention of the agent, became the purchaser:—Held, that the sale having been effected through the means of the agent, he was entitled to the stipulated commission.

THIS was an action by the plaintiff, a house-agent, against the defendant for improperly countermanding his authority to sell an estate for him on commission. There was also a common count for commission, and a count upon an account stated. The defendant paid 25*l.* into court.

*The cause was tried before Byles, J., at the sittings in London after last Hilary Term. The facts which appeared in [*682 evidence were as follows:—The defendant was possessed of a leasehold interest in one of the Channel Islands called the Herm, which he was desirous either of selling or raising money upon; and for this purpose he entered into a negotiation with the plaintiff, who is an auctioneer and estate-agent, who advanced him 300*l.* The following agreement was thereupon drawn up by the plaintiff, and signed by the parties:—

"Agreement made between Thomas John Moysey Bartlett, of No. 16, Abchurch Lane, in the city of London, gentleman, of the one part, and Stephen James Green, of Arthur Street, West, London Bridge, auctioneer, of the other part: Whereby the said Thomas John Moysey Bartlett agrees to borrow, and the said Stephen James Green agrees to lend, the sum of 300*l.*, and, in consideration of that sum this day paid by the said Stephen James Green to the said Thomas John Moysey Bartlett, he doth hereby charge the leasehold estate consisting of one of the Channel Islands, and called the Island of Herm, together with the erections and buildings therein and thereon, and also his policy of assurance, numbered 2309, in the United Kingdom Life Assurance Society, with the re-payment of the said sum at two months from this date:

"And, in consideration of the above-mentioned loan made by the said Stephen James Green to the said Thomas John Moysey Bartlett, he doth hereby instruct the said Stephen James Green to proceed forthwith to a sale, by public auction or otherwise, of the whole of the said island of Herm, together with all erections thereon; and, *if the same shall be sold, the said Thomas John Moysey Bartlett shall pay to the said Stephen James Green 2½ per cent. commission on the amount of *such sale, such commission to cover all expenses of every description.* In case the said estate shall not be sold, the said Thomas [*683 John Moysey Bartlett shall pay to the said Stephen James Green 25*l.* as a compensation for his trouble and expense. And, in case the said Stephen James Green shall go over to the said island and give a valuation of the same, then the said Thomas John Moysey Bartlett shall pay in addition the sum of 5*l.* for the expense of such journey and valuation:

"In case the said estate shall not be sold, it is hereby agreed that the said Stephen James Green shall obtain for the said Thomas John

Moysey Bartlett a loan of the sum of 2000*l.*, or any other sum to which he may agree, upon the security of the said island: and, upon such money being procured by the said Stephen James Green, he shall be entitled to a commission of 2½ per cent. upon the amount so procured: and the said Thomas John Moysey Bartlett undertakes to procure a good and marketable title, according to the laws of Guernsey. As witness the hands of the said parties this 11th day of July, 1862."

Acting upon the instructions he had received, the plaintiff proceeded to advertise the sale of the property in the usual way, and it was put up to auction, but not sold. A gentleman named Hyde, who attended at the auction in consequence of the advertisements, but who did not bid, obtaining from the plaintiff the name of the owner, put himself in communication with the defendant, and ultimately, in the early part of September, bought the property of him for 2500*l.* In the meantime, viz. on the 25th and 29th of August, the defendant had written to the plaintiff withdrawing his authority to sell.

On the part of the plaintiff, it was insisted that by the terms of the agreement he was entitled to his commission of 2½ per cent. "if the property was sold," *whether by him or by anybody else, pro- *684] vided the introduction of the purchaser was effected (as it was submitted it was here) through his means.

On the other hand, it was submitted that the plaintiff's right to "commission" could only arise upon a sale of the property being actually negotiated by him, and consequently that the amount paid into court covered his legal claim under the agreement.

The learned judge, reserving for the court the question upon the construction of the agreement, directed the jury to find for the plaintiff. The jury accordingly returned a verdict for the plaintiff, damages 37*l.* 10*s.* beyond the 25*l.* paid into court.

Shee, Serjt., in Easter Term last, accordingly obtained a rule nisi to enter a verdict for the defendant, on the ground that, "by the terms of the agreement, the plaintiff was not entitled to recover more than the 25*l.* paid into court, and that before the defendant sold the property he withdrew the plaintiff's authority to sell for him."

Coleridge, Q. C., and *Day*, now showed cause.—By the terms of the agreement, the plaintiff was clearly to be entitled to a commission of 2½ per cent. if the property was sold, whether directly by him or indirectly by means of his introduction. Here, the property was sold through the plaintiff's intervention; for, it was through his means that the purchaser became aware that the estate was in the market, and that the defendant was the owner of it. [BYLES, J.—I was of opinion that the sale was effected through the means of the plaintiff.]

Shee, Serjt., and *Talfourd Salter*, in support of the rule.—It never *685] could have been the intention that the *plaintiff was to have a commission of 2½ per cent. if the estate was sold, by whomsoever the sale might have been effected. The true and fair construction of the agreement is, that, if the sale was effected by the plaintiff, he should receive the commission; if not, the sole remuneration he was to have for any trouble and expense he might have incurred, should be the sum of 25*l.*

ERLE, C. J.—I am of opinion that this rule should be discharged.

The agreement between these parties was, that, if the property *should be sold*, the defendant should pay the plaintiff 2½ per cent. commission on the amount of such sale; but that, if it should *not* be sold, the plaintiff's remuneration for trouble and outlay should be limited to 25*l*. Now, the estate was sold, but not by the plaintiff. After the plaintiff had done all he could to effect a sale, and had failed, the defendant, telling the plaintiff that he did not mean to sell the estate, himself privately negotiated a sale with a gentleman who had been attracted to the auction-room by the plaintiff's advertisements, and who had learned from the plaintiff that the defendant was the proprietor of the estate. The question whether or not an agent is entitled to commission on a sale of property has repeatedly been litigated: and it has usually been decided, that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him. I think, the sale here having been brought about through the plaintiff's introduction, the plaintiff is entitled to the stipulated remuneration of 2½ per cent. on the amount of the purchase-money.

WILLIAMS, J.—I am of the same opinion. The case was argued by the defendant's counsel upon the *supposition that the plaintiff claimed to be paid commission provided the estate should be sold by anybody. That, however, is not so. The plaintiff only claims commission provided the sale is effected by him or through his agency. And the evidence distinctly showed that the sale to Hyde was the direct consequence of the plaintiff's act. The plaintiff, therefore, was clearly entitled to the commission. [*686

The rest of the court concurring, Rule discharged.

SPITZER *v.* CHAFFERS. *June* 9.

A deed of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), is not rendered void by an exception out of the assignment to the trustees of "the *necessary* wearing apparel of the debtor, his wife, and family;" or of a leasehold house held by the debtor at a rack-rent, and recited to be of *no value*,—the deed containing a covenant by the debtor to assign it to the trustees when he should be required to do so.

Neither is the deed avoided by a provision enabling the trustees to pay "all costs and expenses which they may have been or may be put to, or which the debtor has sustained in or about and also preparatory and preliminary to the preparing and engrossing of these presents, and procuring the execution of the same, or in or about the negotiations and preparations for this present arrangement, or any negotiations, preparations, or matters in reference to the winding up of the estate of the debtor, and also all costs, &c., attending the investigation which has already taken place, and any future or subsequent investigation, and the arrangement of the affairs of the debtor, and the obtaining the consent of the creditors thereto and to join in and execute these presents, and all disbursements incident thereto, and also all the costs, charges, and expenses of and attending the perusing and approving of these presents on behalf of the general body of creditors."

Nor by the circumstance that the releasing parties are described to be "the parties hereto of the third part," viz. such of the creditors who have executed the deed,—the deed appearing to have been executed by the statutory number required to make it a deed binding upon non-assenting creditors.

THIS was an action by the plaintiff, the drawer, against the defendant, the acceptor, of certain bills of exchange.

The defendant pleaded, that, after the accruing of the alleged causes

*687] of action, and after the Bankrupt *Law Consolidation Act, 1849, commenced and took effect, and before the passing of the Bankruptcy Act, 1861, to wit, on the 3d of November, 1856, an indenture was made between the defendant of the first part, John Charles Atkinson and John Charles Edward Hewett of the second part, and the several other persons whose names and addresses were and are mentioned and set forth in the schedule thereunder written of the third part; which said indenture was and is in the words and figures following, that is to say, "This indenture, made the 3d of November, 1856, between William Chaffers the younger, of, &c., of the first part, John Charles Atkinson, of, &c., and John Charles Edward Hewett, of, &c., of the second part, and the several persons, creditors of the said William Chaffers, whose names and addresses are mentioned and set forth in the schedule hereunder written of the third part: Whereas the said William Chaffers is justly indebted unto the said several persons, parties hereto of the third part in several sums of money, and is not prepared to answer the debts which are due to them as aforesaid: And whereas it was lately proposed and agreed by and between all the said parties to these presents that the said William Chaffers should convey, assign, and assure all his estate and effects unto the said John Charles Atkinson and John Charles Edward Hewett, upon trusts for the benefit of the creditors of the said William Chaffers in manner hereinafter expressed: And whereas, by an indenture bearing date the 1st of November, 1856, and made between the said William Chaffers of the one part, and the said John Charles Atkinson and John Charles Edward Hewett of the other part, the said William Chaffers did convey and assure unto the said John Charles Atkinson and John Charles Edward Hewett, their heirs and assigns, all that his freehold *688] messuage or *tenement, with the garden and appurtenances thereunto belonging, situate at Orpington, in the county of Kent, and now or lately in the occupation of the said William Chaffers, and also all other the freehold messuages, farms, lands and tenements, situate in Great Britain or elsewhere, of which the said William Chaffers was then seised or to which he was entitled either in possession, reversion, remainder, or expectancy, either for an estate in fee-simple or any other estate of freehold or inheritance, with the appurtenances, to hold the same, subject to a mortgage in fee of the particularized hereditaments for securing certain principal and interest moneys, unto and to the use of the said John Charles Atkinson and John Charles Edward Hewett, their heirs and assigns, for ever, or for such other estates of inheritance and freehold property respectively as the said William Chaffers then had therein respectively, upon trust to sell the same, and by, with, and out of the clear rents and profits of the said hereditaments, and the moneys which should arise by or from such sale or sales respectively, to retain or pay the costs, charges, and expenses of and attending the execution of the said trusts, and the money which they and he respectively should disburse for taxes or repairs or insurance from fire, and then to discharge the said mortgage-debt and all other like charges and encumbrances affecting the said hereditaments respectively, and to pay the residue or surplus unto the said William Chaffers, his executors, administrators, or assigns, as personal estate, with power for the said trustees or trustee to examine,

settle, and adjust the mortgage or other account existing between the said William Chaffers and the said mortgagee, and bring the same to a balance, and by and out of the moneys which shall come to the hands of the said trustees or trustee by virtue of the trusts aforesaid, to *pay such sum or sums of money as should appear to the said trustees or trustee to be due and owing upon or by virtue of [*689 the said mortgage security: And whereas the hereinbefore-recited indenture was executed by the said William Chaffers at the instance and request of his creditors, and in order and to the intent that the residue or surplus of the moneys arising as well from the rents and profits as from the sale of the said freehold hereditaments, and which under or by virtue of the hereinbefore mentioned trusts was to be paid and payable to the said William Chaffers as aforesaid, should be assigned in and by these presents, together with the rest of the personal estate and effects of the said William Chaffers, upon the trusts hereinafter declared: And whereas the said William Chaffers has no property of copyhold or customary tenure, and he has no leasehold property except a messuage or tenement known as No. 14, Grafton Street, Bond Street, in the county of Middlesex, and which is held by him for a term of twenty-one years from the 29th of September, 1855, at the yearly rent of 225*l.* 5*s.*, being in fact a rack-rent, and the said property is therefore of itself of no value: And whereas, upon consideration of the circumstances last mentioned, it has been determined and agreed that the said leasehold property shall not at present be actually assigned by the said William Chaffers, but that he shall enter into the covenant hereinafter contained to assign the same when required unto the said John Charles Atkinson and John Charles Edward Hewett, their executors, administrators and assigns, or as they shall direct: Now, this indenture witnesseth, that, in pursuance of the agreement in this behalf hereinbefore recited, and for vesting all the property of the said William Chaffers in the said John Charles Atkinson and John Charles Edward Hewett upon the trusts hereinafter mentioned, *and in consideration of 10*s.*, &c., he the said William Chaffers, [*690 with the privity of the said several persons parties hereto of the third part, testified by their being parties to and executing and delivering these presents, hath bargained, sold, assigned, transferred, and set over, and by these presents doth bargain, sell, assign, transfer, and set over unto the said John Charles Atkinson and John Charles Edward Hewett, their executors, administrators, and assigns, all and singular his the said William Chaffers's stock in trade, book and other debts, policies of assurance, shares in public companies, bonds, bills, and securities for money, legacies, household furniture, plate, linen, china, books, carriages, and horses, and all other his personal estate, goods, chattels, and effects, whatsoever and wheresoever, except the said leasehold premises hereinafter covenanted to be assigned by him, and also the necessary wearing apparel of the said William Chaffers and his family, and also all the balance and surplus, if any, of the produce or money which, after payment and satisfaction of all expenses, and discharge of the mortgages and other encumbrances affecting the same, shall or may become due and payable to the said William Chaffers, or belong to him on his said freehold property which hath been conveyed to and vested in the said John Charles

Atkinson and John Charles Edward Hewett by the said hereinbefore-recited conveyance, and all the right, title, interest, trust, possession, property, claim, and demand whatsoever, both at law and in equity, of him the said William Chaffers into, from, and out of the said property, goods, chattels, moneys, effects, and premises, together with all books, writings, deeds, bills, notes, and receipts, papers and vouchers, touching the same, or any part thereof, to have and to hold, receive, take, and enjoy all and singular the said premises hereby
*691] assigned, or intended so to be, unto *and by the said John Charles Atkinson and John Charles Edward Hewett, their executors, administrators, and assigns, henceforth for ever, as their own proper goods, chattels, and effects, but nevertheless upon and for the trusts, intents, and purposes hereinafter expressed and contained of and concerning the same: And the said William Chaffers, with the privity of the said persons parties hereto of the third part testified as aforesaid, hath made, constituted, and appointed, and by these presents doth make, constitute, and appoint the said John Charles Atkinson and John Charles Edward Hewett, and the survivor of them, and the executors or administrators of such survivor, and their or his assigns, to be the true and lawful attorneys or attorney of him the said William Chaffers, his executors or administrators, to ask, demand, sue for, recover, and receive, of and from all and every the persons and person who ought to pay and deliver up the same, all and singular the premises hereby assigned or intended so to be, and, in case of non-payment or non-delivery thereof, or any part thereof, to compound for the same, or submit any difference regarding thereto to arbitration, or commence, prosecute, answer, or defend any action or actions, suit or suits, at law or in equity for the recovery thereof, or any part thereof, or concerning the same, and upon the receipt thereof, or of any part thereof, to give releases and discharges for the same, and to constitute and appoint such person or persons to act under them the said attorneys, or any or either of them, as they or he shall think necessary and proper, and for all or any of the purposes aforesaid to use the name or names of the said William Chaffers, his executors or administrators, and generally to act in and about the premises as fully and effectually to all intents and purposes as he the said William Chaffers
*692] *might or could lawfully do if these presents had not been made, he the said William Chaffers hereby ratifying, allowing, and confirming all and whatsoever his said attorneys and attorney, or any person or persons appointed by them or him as aforesaid, shall lawfully do or cause to be done in or about the premises, agreeably to the true intent and meaning of these presents: And the said William Chaffers doth hereby, for himself, his heirs, executors, and administrators, covenant, declare, and agree with and to the said John Charles Atkinson and John Charles Edward Hewett, their executors and administrators, that he the said William Chaffers, his executors or administrators, shall and will at any time hereafter, when thereunto required by the trustees or trustee for the time being of these presents, and at the costs and charges of the said trust-estate, assign to the said John Charles Atkinson and John Charles Edward Hewett, their executors, administrators, and assigns, or other the trustees or trustee for the time being of these presents, to be held upon, under, and

subject to the trusts hereby declared of and concerning the premises hereby assigned, or unto such person or persons as the trustees or trustee for the time being of these presents shall direct, the said leasehold premises hereinbefore mentioned, and all his the said William Chaffers's estate, term, and interest therein; and that in the meantime the said leasehold premises may be deemed to be subject to the trusts hereinafter declared: And it is hereby agreed and declared that the said John Charles Atkinson and John Charles Edward Hewett, their executors, administrators, and assigns, shall stand possessed of the goods, chattels, moneys, property, effects, and premises hereby assigned, and of the said leasehold premises, upon the trusts hereinafter mentioned, that is to say, Upon trust that they the said John Charles *Atkinson and John Charles Edward Hewett, or the survivor of them, or the executors or administrators of such survivor, [*693 do and shall forthwith, or at such time or times as they or he in their or his discretion shall think proper, call in and compel payment of such of the said premises as consist of money or securities for money, or sell, assign, transfer, and dispose of the same for the best price that can be reasonably had or gotten for them, and do and shall sell and assign, dispose of, and convert into money all other the premises hereby assigned or intended so to be, or which are subject to the trusts hereof, for the best price or prices that can be reasonably had or gotten for the same: And it is hereby agreed and declared that such sales shall be made either by public auction or private contract, or partly by public auction and partly by private contract, and at such periods as the said trustees or trustee shall think fit: And it is hereby further agreed and declared that the said John Charles Atkinson and John Charles Edward Hewett, and the survivor of them, and the executors or administrators of such survivor, shall stand possessed of and interested in all and every the sums and sum of money which they or he shall receive by virtue of the trusts and powers aforesaid, and of and in the sum and sums of money to arise from the sale or sales of the hereditaments and premises comprised in the hereinbefore-recited indenture, and of and in the rents, issues, and profits thereof to be received by the said trustees or trustee, upon the trusts hereinafter mentioned, that is to say, Upon trust that they the said John Charles Atkinson and John Charles Edward Hewett, and the survivor of them, and the executors or administrators of such survivor, do and shall, by, with, and out of the said moneys, retain to and reimburse themselves and himself, and pay and discharge, all costs, charges, and *expenses which they or he, or any of them, have paid, sustained, or been put unto, or shall or may pay, sustain, or be put [*694 unto, or which the said William Chaffers hath sustained or been put unto in or about and also preparatory and preliminary to the preparing and engrossing of these presents, and procuring the execution of the same, and of the hereinbefore-recited conveyance of the said freehold hereditaments, and otherwise incidental thereto, or in or about the negotiations and preparations for this present arrangement, or any negotiations, preparations, or matters in reference to the winding up of the estate of the said William Chaffers, and also all costs, charges, and expenses attending the investigation which has already taken place, and any future or subsequent investigation and the arrangement of

the affairs of the said William Chaffers, and the obtaining the consent of the said several creditors thereto and to join in and execute these presents, and all disbursements incident thereto, and also all the costs, charges, and expenses of and attending the perusing and approving of these presents and the hereinbefore-recited indenture on behalf of the general body of creditors of the said William Chaffers, and pay and satisfy the solicitors, accountants, agents, and other persons employed by the said trustees or trustee or by the said William Chaffers, all the costs, charges, salaries, and expenses for investigating the accounts and state of the affairs of the said William Chaffers, and preparing, engrossing, and procuring the execution of these presents and the hereinbefore-recited indenture, and also all the costs, charges, and expenses of and attending the execution of the trusts of these presents and of the hereinbefore-recited indenture, or incident thereto; and, after payment and satisfaction of all such costs, charges, salaries, and expenses, do and shall apply the whole or a competent *part
*695] of the residue of the said moneys in payment to the creditors of the said William Chaffers of the debts owing to them respectively, rateably and in proportion to the amount of their said respective debts, but with such and the same rights respectively as to set-off, mutual credit, lien, and priority, and in the same manner in all respects as if the estate were distributed in bankruptcy; and do and shall pay the residue or surplus, if any, of the said moneys unto the said William Chaffers, his executors, administrators, or assigns: And it is hereby further agreed and declared, that all the moneys which shall be received by the said trustees or any of them in pursuance of the trusts of these presents and of the hereinbefore-recited indenture, shall be paid by them into the banking-house of Herries, Farquhar & Co., and placed to the account of the trustees until the same shall amount to a sufficient sum to pay a dividend of 2*s.* 6*d.* in the pound upon all the debts of the said William Chaffers; and that, as soon as the same shall amount to sufficient to pay a dividend of 2*s.* 6*d.* in the pound upon all the said debts, the said trustees or trustee shall pay and divide the same amongst the said creditors, their executors, administrators, or assigns, until their several debts shall be fully paid and satisfied or the said trust moneys entirely exhausted: Provided, always, and it is hereby declared and agreed, that, in case there shall be any sum or sums of money owing by the said William Chaffers on bills or otherwise which are not yet become payable, the trustees or trustee for the time being shall pay the same sums of money or a dividend thereon, on being allowed discount or rebate for the acceleration of payment, in the same manner as if the said sum or sums had been proved or claimed under an adjudication of bankruptcy: and it is hereby declared that all claims of the said creditors of the said
*696] *William Chaffers as aforesaid shall be verified and proved by the statutory declaration of the several creditors, stating the amount and consideration of the same, if the trustees or trustee for the time being, or any three or more of the creditors whose aggregate admitted claims shall amount to the sum of 100*l.* or upwards, shall require the same; and, further, that it shall be lawful for the said trustees or trustee for the time being to admit any person or persons a creditor or creditors under or by virtue of these presents for any

sum or sums of money claimed by him, her, or them from the said William Chaffers, on such evidence as such trustees or trustee shall think reasonable, and also that, notwithstanding anything hereinbefore contained, the trustees or trustee for the time being shall or may compound any sum or sums of money owing or claimed to be owing to the said William Chaffers, or accept part thereof, or a security for the same, in full thereof, or give further time for payment of the same: And it is hereby declared and agreed between and by the said parties to these presents, that it shall and may be lawful to and for the trustees or trustee for the time being of these presents, but with and out of any money which shall come to their or his hands under or by virtue of these presents, to pay off and discharge the said mortgage hereinbefore mentioned, or any lien or other encumbrance upon the real or personal estate of the said William Chaffers, or to redeem any property of the said William Chaffers which may be pledged, notwithstanding that the money so to be applied may not have arisen from the estate or property the mortgage, lien, or encumbrance whereon, or pledge whereof, shall be proposed to be discharged: And it is hereby further declared and agreed, that, in case any dispute, delay, or difficulty shall arise between the said trustees or trustee and any creditor or creditors of the said *William Chaffers, then and in that case the full and exclusive power of determining the same respectively may be [*697 referred to such person or persons as the said trustees or trustee for the time being on the one part, and the said creditor or creditors on the other part, shall appoint for that purpose; and that the award or determination of the person or persons so appointed shall be final and conclusive on all persons entitled to any interest under these presents; and, further, that the trustees or trustee for the time being shall or may employ the said William Chaffers or any other person or persons to assist in the management, sale and disposition, and collection of the produce of all or any of the property hereby vested in the said trustees or trustee, and also to settle the accounts of the said William Chaffers, and to collect the credits owing to the said William Chaffers, and to give or allow the said William Chaffers or other the person or persons to be employed as aforesaid such salary or compensation or allowance by way of commission as the said trustees or trustee for the time being shall think reasonable; and, in case it shall be deemed expedient or advisable to bring or commence or to defend any action or actions or suit or suits at law or in equity concerning the said trust-estates, the said trustees or trustee for the time being shall or may exercise their or his discretion in commencing or defending the same, and shall and may retain all costs, charges, and expenses in anywise relating thereto out of the money which shall be received by him and them by virtue of the trusts aforesaid: And it is hereby agreed and declared that the receipts or receipt of the said trustees or trustee for the time being of these presents, or their or his agents or attorney acting under them or him, for any sum or sums of money paid to them or him by any purchaser or other person by virtue of these presents, shall effectually discharge the persons paying the same from the necessity *of inquiring into and the liability to see to the application [*698 thereof, and from all responsibility in respect of the loss, misapplication, or non-application thereof: And the said William Chaffers

doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said John Charles Atkinson and John Charles Edward Hewett, their executors, administrators, and assigns, in manner following, that is to say, that he the said William Chaffers, his executors, administrators, and assigns, shall not nor will, at any time or times hereafter, by himself or themselves, or by any agent or agents, receive or take into his or their possession any of the premises hereby assigned or expressed or intended so to be, or release, give up, or discharge the same, or any part thereof, or release or become nonsuit in any action to be commenced or brought for the recovery thereof, without the consent of the trustees or trustee for the time being under these presents, in writing, first had and obtained, nor do, commit, or suffer any act, matter, or thing whatsoever whereby or by means whereof the said trustees or trustee shall or may be hindered or obstructed from receiving, recovering, and getting in the said premises, or any of them, or from executing the trusts and powers hereinbefore mentioned; and that he the said William Chaffers, his executors or administrators, shall not nor will revoke or make void the powers and authorities hereby granted by him, but, on the contrary, he and they shall and will, upon every request to be made to him and them for that purpose, do, perform, or execute, or cause to be done, performed, or executed, all such further and other lawful and reasonable acts, deeds, matters, and things which the said trustees or trustee, their or his counsel, shall advise or require, for the better and more speedily and effectually recovering, *receiving, and getting in the said premises hereby assigned, and every part thereof, and carrying into execution the trusts and powers hereinbefore mentioned; and that he the said William Chaffers hath, at or before the time of executing these presents, made a true and faithful disclosure to the said John Charles Atkinson and John Charles Edward Hewett of all his estates, effects, and property, and that he hath not withheld or embezzled any part or parts thereof, and that the statement of account signed by the said William Chaffers and delivered to the said trustees or their agent at or before the time of the execution of these presents doth contain a just and true account of all the estates and effects and of all debts and credits of the said William Chaffers, as far as it is in the power of the said William Chaffers to make out such account, and that, if required, he will verify and attest the same account by a solemn declaration; and, further, that he the said William Chaffers shall and will at all times hereafter when thereunto required, make such discoveries and explanations of his affairs as the trustees or trustee for the time being shall require, and shall aid and assist the said trustees or trustee for the time being in conducting and managing the concerns of the said trust-estate in such manner as to the said trustees or trustee shall seem reasonable: And this indenture lastly witnesseth that the said several persons parties hereto of the third part, in consideration of the premises, have severally and respectively, and every and each of them, for himself, his heirs, executors, and administrators, hath, and by these presents do, and each and every of them doth, remise, release, and for ever quit claim unto the said William Chaffers, his heirs, executors, and administrators, all actions, suits, accounts, reckonings,

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claims, and demands whatsoever, which they, any or either of them, their or any *of their heirs, executors, or administrators, now have or hath against the said William Chaffers, his estate or [*700 effects, for or by means or on account of all and every or any of the debts due or owing from or liabilities by him to them on any account whatsoever: Provided, always, and it is hereby agreed and declared between and by the said parties to these presents, that, in case the said William Chaffers shall conceal or withhold from the said trustees or creditors, or embezzle, any part of his estate, effects, and property, real or personal, to the amount or value of 10*l.* or upwards, then and in either of such cases the release hereinbefore contained from the said several creditors to the said William Chaffers shall be absolutely void to all intents and purposes whatsoever, anything hereinbefore contained to the contrary notwithstanding: Provided also, that, in case six sevenths in number and value of the creditors of the said William Chaffers whose debts amount to 10*l.* and upwards shall not, by themselves or by their respective attorneys or agents by them respectively thereunto authorized, duly execute these presents within the space of three calendar months next after the date hereof, then and in such case these presents and the release hereinbefore contained to the said William Chaffers from his said several creditors, and every other article, matter, and thing herein contained, shall cease, determine, and be utterly void, anything herein contained to the contrary thereof in any wise notwithstanding: Provided also, and it is hereby agreed and declared between and by the said parties to these presents, that, if the said John Charles Atkinson and John Charles Edward Hewett, or either of them, or any future trustee to be appointed in their or either of their stead or place as hereinafter is mentioned, or their respective heirs, executors, or administrators, shall happen to die, or *be desirous of being discharged from, or refuse or decline or become incapable to act in, the trusts hereby in them reposed [*701 as aforesaid, before the same shall be fully executed, performed, or discharged, then and in such case, and when and as often as the same shall happen, it shall and may be lawful to and for the said creditors of the said William Chaffers, or the majority of them in value, by any writing or writings to be executed by them in the presence of and attested by two or more credible witnesses from time to time to nominate, constitute, and appoint any other person or persons to be a trustee or trustees in the stead or place of the trustee or trustees so dying, or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid; and that, when and as often as any new trustee or trustees shall be nominated as aforesaid, all the trust-estate, money, and premises which shall be then vested in the trustee or trustees so dying or desiring to be discharged, or refusing, declining, or becoming incapable to act as aforesaid, shall be thereupon, with all convenient speed, assigned and transferred in such sort and manner and so as the same shall and may be legally and effectually vested in such new trustee or trustees either alone or jointly with the continuing trustee or trustees, as the case may be, upon the same trusts as are hereinbefore declared of and concerning the same trust-estate, moneys, and premises respectively, or such of them as shall or may be then subsisting and capable of taking effect: And it is hereby

further agreed and declared by and between the parties to these presents, that every such new trustee shall and may in all things act and assist in the execution of the trusts to which he shall be so appointed, as fully and effectually, and with all the same powers and authorities to all intents and purposes whatsoever as if he had origi-
*702] nally in and by *these presents been nominated a trustee, and as the said John Charles Atkinson and John Charles Edward Hewett, their heirs, executors, administrators, and assigns are enabled to do, anything hereinbefore contained to the contrary thereof in anywise notwithstanding: Provided also, and it is hereby declared, that the said John Charles Atkinson and John Charles Edward Hewett, their respective heirs, executors, administrators, and assigns, and other the trustee or trustees to be appointed as aforesaid, and each and every of them, and the heirs, executors, administrators, and assigns of them, each and every of them, shall be charged and chargeable respectively only for such moneys as they shall respectively actually receive by virtue of the trusts hereby in them reposed, notwithstanding his or their or any of their giving or signing, or joining in giving or signing, any receipt or receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, deeds, neglects, or defaults of the other or others of them, but each and every of them only for his and their own acts, receipts, neglects, or defaults respectively; and that they or any of them shall not be answerable or accountable for any banker, broker, or other person with whom or in whose hands or custody any part of the said trust moneys shall or may be deposited or lodged for safe custody, or for any attorney or agent whom they or he shall or may employ or authorize in the execution of the trusts hereinbefore mentioned, nor for any misfortune, loss, or damage which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their or his own wilful default respectively; and also that it shall and may be lawful to and for the said trustees, and every or any of them, their and
*703] every of their *heirs, executors, administrators, or assigns, by and out of the moneys which shall come to their respective hands by virtue of the trusts aforesaid, to retain to and reimburse himself and themselves respectively, and also to allow to his and their co-trustee and co-trustees, all costs, charges, damages, and expenses which they or any of them shall or may suffer, sustain, expend, disburse, be at, and be put unto, in or about the execution of the aforesaid trusts, or in relation thereto; and, especially, it is hereby agreed and declared that it shall be lawful for the said John Charles Atkinson and John Charles Edward Hewett, or any trustee who may be an auctioneer, to make all such and the like charges, and to receive such and the like remuneration and emoluments for business professionally transacted for the said trust-estate as he would be entitled to make and receive for the business so transacted in case he had not been a trustee appointed by these presents, any rule of law or equity to the contrary thereof notwithstanding: In witness," &c.: Averment, that the said indenture was a deed of arrangement made and entered into between the defendant, then being a trader within and subject to the Bankrupt Law Consolidation Act, 1849, unable to meet his

engagements with his creditors, and who had suspended payment, and his creditors, touching his liabilities, and his release therefrom, and the distribution, inspection, conduct, and mode of winding up his estate, and was then signed by and on behalf of six sevenths in number and value of his creditors whose debts amounted to 10*l.* and upwards, every such creditor being accounted a creditor in value in respect of such amount as upon an account fairly stated, after allowing the value of mortgaged property, and all other such available securities or liens from the defendant, appeared to be the balance due to him; that the plaintiff, before and when the *defendant suspended payment as aforesaid, and before and when the said [*704 deed was made, was a creditor of the defendant in respect of the causes of action in the declaration mentioned; that the plaintiff afterwards had notice from the defendant of his suspension of payment, and of the said deed; that three calendar months had elapsed after such notice and before this suit; that the defendant and the said trustees, and all persons parties to the said deed, had always been ready and willing to permit the plaintiff, so being and as such creditor, to become a party to the said deed of the third part, and to participate in the benefits thereof, whereof the plaintiff had always had notice; that the defendant was such trader, and resided and carried on business as such trader for six calendar months next immediately preceding his said suspension of payment and the date and execution of the said deed, within the district of the Court of Bankruptcy for the London district; that all things and events had been done and happened to render the said deed effectual and obligatory on the plaintiff as a creditor who had not signed the same, within the true intent and meaning of the said act; and that the defendant was and is by the said deed, and the several provisions and the operation of the said act, released and discharged from the supposed causes of action.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that the deed set out in the third plea was not obligatory upon a creditor who has not signed the same, and that the defendant was not thereby released and discharged from the causes of action in the declaration mentioned." Joinder.

Hayes, Serjt. (with whom was *Barnard*), in support of the demurrer. The question turns upon the 224th section of the Bankrupt Act, 1849, 12 & 13 Vict. c. 106. *The deed set out in the plea purports [*705 to be a conveyance to trustees of all the personal estate of the debtor, with the exception of certain leasehold premises held by him, and also the necessary wearing apparel of himself and his family, without qualification. Shortly after the elaborate discussion of Tetley *v.* Taylor, 1 Ellis & B. 521 (E. C. L. R. vol. 72), the Court of Queen's Bench had before them a case of Cooper *v.* Thornton, 1 Ellis & B. 544, where they held that a deed signed by six-sevenths of creditors to the amount of 10*l.* and upwards was not valid under this statute, though it conveyed the debtor's whole estate to trustees, if it empowered them to give back to the debtor effects to the value of 20*l.* And in March *v.* Warwick, 1 Hurlst. & N. 158, it was distinctly held by the Court of Exchequer that a deed which excepts from the assignment the wearing apparel of the debtor and his family, is void. Worlledge, in argument, then said,—"The 109th section authorizes a mes

senger acting under the warrant of the court 'to seize any property of the bankrupt (his necessary wearing apparel only excepted).' So, by the 156th section, if any assignee indebted to the bankrupt's estate become bankrupt and obtain his certificate, it shall have the effect only of freeing his person from imprisonment, 'but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife, and children excepted) shall remain liable,' &c. Again, the 251st section declares that a bankrupt shall be deemed guilty of felony who shall not deliver up to the court such part of his estate 'as shall be in his possession, custody, and power, (except the necessary wearing apparel of himself, his wife, and children).' In like manner, the common law makes an exception as to wearing apparel. An innkeeper has a lien on the goods of his guest, but he cannot take off his clothes: Sunbolf *v.* Alford, 3 M. & W. *706] *248." But Martin, B., said: "Cooper *v.* Thornton decided that a deed of this description is not valid, though it conveys the debtor's whole estate to trustees, if it empower them to give back to the debtor effects to the value of 20*l.*" [BYLES, J.—It was so decided in all the courts: there must be a cessio bonorum, without any exception: see the judgment of the Exchequer Chamber in Cruger *v.* Dunlop, 7 Hurlst. & N. 525. Then, the covenant as to the leasehold premises in Grafton Street, leaving it to the discretion of the trustees to take an assignment or not, clearly avoids the deed. Then, there is a provision for stopping costs out of the estate, which is of a very extensive description. In Irving *v.* Gray, 3 Hurlst. & N. 34, the provision for costs was "for the payment of the costs and expenses of and attending the preparation of the deed and perusal thereof, and the management of the debtor's affairs between the meeting of the creditors and the execution of the deed, or relating or preparatory to the meeting of creditors, and incident thereto and to the investigation of the affairs since the debtor stopped payment." Here, the provision as to costs is infinitely more extensive, and would enable any creditor who has incurred costs in abortive negotiations to recover those costs in full. Further, the release is by the scheduled creditors only, and not binding on non-executing creditors. In Legg *v.* Cheesebrough, 5 C. B. N. S. 741 (E. C. L. R. vol. 94), the deed contained a clause by which each of the creditors *parties to or bound by the deed* covenanted not to sue, impede, or molest the defendant; and then followed another clause to the effect that, if any creditor *by whom or on whose behalf the deed should have been actually executed* should act contrary to that covenant, the debtors should be absolutely discharged from all claims and demands both at law and in equity by such creditor: and it was *707] held that this *latter clause was not binding upon the plaintiff, —it being in its nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general. [WILLES, J.—Is there any distinction between the present case and Cooper *v.* Thornton?] None whatever.

J. Brown, contrà.—No case has ever yet decided that a deed like this is void. The debtor assigns all his effects, except a leasehold at rack-rent, which is of no value, and which he covenants to assign if required, and except the *necessary* wearing apparel of himself and his family. In March *v.* Warwick, 1 Hurlst. & N. 158, the Court of Ex-

chequer did not decide as is represented. [WILLES, J.—Cooper *v.* Thornton is not in point. The sheriff under a fi. fa. cannot take a man's coat; neither could the assignees under the statutory execution. In Hardistey *v.* Barney, Comb. 356, Holt, C. J., says: "Upon a fi. fa., the sheriff may take anything but wearing clothes; nay, if the party hath two gowns, he may take one of them." So, in Sunbolf *v.* Alford, 3 Exch. 248, Parke, B., says: "Wearing apparel on a man's person (even if it does not extend to goods in the possession of the person) cannot be taken under a fi. fa., or under an extent."] When the Court of Queen's Bench in Tetley *v.* Taylor, 1 Ellis & B. 521 (E. C. L. R. vol. 72), laid it down that there must be a cessio of *all* the goods to the creditors, it must be understood with this limitation,—all that could be made available for the bankrupt's creditors. Snodin *v.* Boyce, 4 Hurlst. & N. 391, is no authority beyond a confirmation of March *v.* Warwick. In Cruger *v.* Dunlop, 7 Hurlst. & N. 525, there was no exception of wearing apparel: several exceptions were taken to the deed; and it does not very clearly appear upon which of them the judgment proceeded. [WILLES, J.—That case certainly has nothing *to do with this point.] As to the leasehold, the trustees made [*708 the best possible arrangement for the creditors, by taking a covenant from the debtor to assign it when required,—a course which is common with conveyancers who desire to have the security of a leasehold without the encumbrance: and any neglect on the part of the trustees is amply provided against by the 229th section.(*a*) Leaseholds under the bankrupt acts do not vest in the assignees, unless they do something to manifest their election to take to them; Copeland *v.* Stephens, 1 B. & Ald. 593. [WILLES, J.—And see Ringer *v.* Cann, 3 M. & W. 343.(*b*)] Then, the provision as to costs is not unreasonable: it is only applicable to the costs incurred *by the trustees* in and about the arrangement. Then, as to the release,—it is said that only enures as a release by the assenting creditors, "the parties of the third part." The deed was intended to operate as to *all* the creditors: the assignment is of *all* the debtor's estate except the valueless leasehold and the *necessary* wearing-apparel of the debtor, his wife, and children; and the *trust is to distribute the proceeds rateably [*709 as in bankruptcy. Below the release there is this proviso,— "Provided also, that, in case six sevenths in number and value of the creditors of the said William Chaffers whose debts amount to 10*l.* and upwards, shall not by themselves or by their respective attorneys or agents, &c., duly execute these presents within the space of three calendar months next after the date hereof, then and in such case these presents, and the release hereinbefore contained to the said William Chaffers from his said several creditors, and every other article, mat-

(*a*) Which enacts, "that, if any creditor of any trader shall be desirous to show that the administration of the estate of such trader has not been duly conducted in conformity with such deed or memorandum of arrangement, it shall be lawful for him to apply to the court by petition, supported by affidavit, stating any facts or circumstances to show that such administration has not been duly conducted, and thereupon the court shall have full power and it is hereby fully authorized to consider the subject-matter of such application, and if it shall think fit may direct any inquiry, and in such manner as it shall think proper, into the subject of such application, and generally may make such order and exercise such jurisdiction in or over the subject-matter of such application and the costs thereof as to the said court shall appear just."

(*b*) And see the notes to Auriol *v.* Mills, 1 Smith's Leading Cases 748, 769.

ter, and thing herein contained, shall cease, determine, and be utterly void." In Legg *v.* Cheesebrough, the covenant not to sue affected to bind "each of the creditors parties to or bound by the deed:" and Willes, J., in delivering the judgment of the court, said: "The distinction is carefully made by the language of the instrument, between such creditors as are to be bound by the deed and such as actually execute it. As to the former, the deed is so worded that they do no more than covenant not to sue. But, as to the latter, the bringing an action is to amount to a defeasance. It was argued, however, on the part of the defendants, that such a distinction is precluded by the language of the 224th section, which says that every such deed shall be as effectual and obligatory in all respects on all the creditors who shall not have signed such deed, 'as if they had actually signed the same.' On the other hand, it was contended that the clause in question was in its very nature merely personal to the individual creditors who chose to sign the deed, and inapplicable to the creditors in general. We are of that opinion. The expression so much relied upon by the defendants is used only to describe the operation and effect of the power given to the majority of the creditors to bind the minority, *710] when the *intention to exercise that power is expressed in apt words, and not with the view of restraining or expanding the proper meaning of the words which have actually been used." [WILLES, J.—That was founded upon Macnaught *v.* Russell, 1 Hurlst. & N. 611.] Irving *v.* Gray, 3 Hurlst. & N. 34, is an authority in favour of the defendant upon this point. [BYLES, J.—If this is a good deed under s. 224, and the release executed by the required number, why argue this point?]

Hayes, Serjt., in reply.—March *v.* Warwick and Snodin *v.* Boyce are precisely in point: it was assumed in both to be an exception of *necessary* wearing apparel. In March *v.* Warwick, it was averred in the plea that the debtor had no more wearing apparel than was necessary for himself, his wife, and children. [BYLES, J.—Necessary wearing apparel would be practically excepted in bankruptcy, because the messenger would not be empowered to seize it.] This provision is not confined to what is in actual use. [WILLES, J.—It was said in one case, that, if the debtor were found in bed, his clothes might be taken.] That is now provided for by statute. In Chitty's Practice, 11th edit. 642, it is said, that, "before the 8 & 9 Vict. c. 127, the general rule of law was, that the sheriff might seize and sell all the personal goods and chattels belonging to the defendant that he could find, and which could be sold, with the exception of wearing apparel actually in use, and perhaps goods in the personal possession of the defendant. By that act, s. 8, after reciting that 'it is expedient to protect the actual necessaries of or belonging to judgment-debtors from being seized in execution,' it is enacted, 'that, from and after the passing of this act, the wearing apparel and bedding of any judgment-debtor, or his family, and the tools or implements of his trade, the value *711] of such apparel, *bedding, tools, and implements not exceeding in the whole the value of 5*l.*, shall not be liable to seizure under any execution or order of any court against his goods and chattels.'" The exclusion of the leasehold property clearly vitiates the deed: the objection is not removed, either by the mere statement that it is of no

value, or by the covenant to assign it when required by the trustees so to do. As to the costs, the provision is not limited in the way suggested: it is not confined to the costs of and incidental to the preparation of the deed and the getting in the estate. [ERLE, C. J.—All the costs have reference to turning the property into assets.] Not necessarily so. "Perusing and approving these presents" would include expenses incurred by any creditor who placed the deed before a conveyancer for advice as to whether he should sign it or not. [WILLES, J.—I think this objection is met by the case of Irving *v.* Gray.] In Gardner *v.* Chapman, 8 C. B. N. S. 317 (E. C. L. R vol. 98), a composition-deed made in alleged pursuance of the 224th section of the Bankrupt Law Consolidation Act, 1849, contained a clause which was to operate to defeat any action brought by a creditor,—whether one who had executed the deed or not,—by making the bringing of such action ipso facto a release and forfeiture of the debt; and also a clause enabling any creditor, by leave of the inspectors, notwithstanding the former provision, to bring an action, and, in case of success, to receive dividends upon the amount recovered. And it was held that the operation of these clauses was, to establish a double inequality, first, in respect of the power of the inspectors to allow an action, or not, at their discretion,—secondly, in respect of the possible mis-application of the assets in payment of the costs of such creditors as might by leave of the inspectors bring actions and recover judgment: and consequently that the deed was not valid. *[WILLES, J.—That case has no application here.] The release in terms does not purport to bind the general body of creditors, but only those who sign the deed. [*712

ERLE, C. J.—I am of opinion that this is a valid deed, and that consequently the defendant is entitled to judgment. The plaintiff sues the defendant as the acceptor of certain bills of exchange. The defendant pleads that the causes of action accrued after the Bankruptcy Act, 1849, and before the Bankruptcy Act, 1861, that a deed was made between him and the requisite number of his creditors under the first-mentioned act, and that all things were done and happened to render the deed effectual and obligatory on the plaintiff as a creditor who had not signed the same, within the true intent and meaning of the act, and that the defendant was by operation of the deed and the provisions of the act discharged from the causes of action. Our judgment turns upon the question whether the deed has complied with the requisitions of the 224th section. Looking at the terms of the statute, and at the series of decisions upon it, the general intent was, that a trader unable to meet his engagements might avoid going through the court of bankruptcy if he could come to an arrangement with six-sevenths in number and value of his creditors to make over to trustees all his available assets, upon trust for the equal benefit of all his creditors. The first three objections relied upon by the plaintiff are, that the deed is void because it does not purport to assign to the trustees all the available assets of the debtor; and the fourth is, that the release at all events did not bind non-executing creditors, but was in terms confined to the parties of the third part. I am of opinion that all the objections fail.

*713] Much of the argument has turned upon the question *whether the deed was void by reason of the exception of the necessary wearing apparel of the debtor, his wife, and family. Can he be said to have done what the legislature requires of him, when he has reserved to himself the necessary wearing apparel of himself and family? It seems to me that that objection is not tenable. From the earliest Bankruptcy Act to the present time, as far as we can discover, the necessary wearing apparel of the bankrupt and his family has not been taken from him, from a principle of humanity and civilization. In all the statutes (though in some of them not expressly) the exception has been recognised, because the necessary wearing apparel has been excepted from the order to the messenger to seize the bankrupt's property; and the bankrupt has not been held liable to an indictment for keeping back necessary wearing apparel. Here, all the debtor's available assets have been assigned; and it would be idle to call upon him to assign that which is valueless. The case has not been much argued before us on principle; but it has been rested entirely upon the authorities, beginning with Tetley *v.* Taylor, 1 Ellis & B. 521, where it was held that the deed, to be valid, must contain a cessio bonorum, and coming down to some still more recent cases which have been very strongly pressed. One of these was Cooper *v.* Thornton, 1 Ellis & B. 544 (E. C. L. R. vol. 72), where it was held that a deed conveying the whole of the debtor's property was invalid because it empowered the trustees to give back to the debtor effects to the value of 20*l.* March *v.* Warwick, 1 Hurlst. & N. 158, where it was held that a deed which excepted from the assignment the wearing apparel of the debtor and his family was void, was also relied on. I admit that there is no distinction between that case and this, save that here the word "necessary" is introduced. This at first might be thought *714] to be a shadowy *distinction, though wearing apparel may sometimes consist of things of very large value. The deed in March *v.* Warwick was attempted to be propped up by an averment that the debtor possessed no wearing apparel that was not necessary for himself and his family: but I think the court was justified in holding that the deed must be valid at the time of its execution, and that it was no part of their province to institute an inquiry into the value. I distinguish the case, because, though I must confess that my mind does not go along with the decision, nevertheless, sitting in a court of co-ordinate jurisdiction, I am bound by it. But "wearing apparel" may be a very different description of property from "necessary wearing apparel." The case which seems to me to be the strongest is Snodin *v.* Boyce, 4 Hurlst. & N. 391, where a deed which provided for the distribution of the debtor's estate in the same manner "*as if he had become bankrupt*" on a certain day, was held void,—since a deed of arrangement must provide for the distribution of *all* the debtor's estate, but a bankrupt is entitled to retain certain excepted articles. The judgment of the majority of the court is, that, March *v.* Warwick having held that a deed of arrangement which excepts from the assignment the wearing apparel of the debtor and his family is void, and Cooper *v.* Thornton having held that a deed which conveys the whole of the debtor's estate to trustees, but empowers them to give back to the debtor effects to the value of 20*l.* was also void,—those

two cases taken together decided the case in hand. Honestly intending to carry out the views of the legislature, I must confess it would be entirely repugnant to my notions to hold that a deed excepting necessary wearing apparel was void on that account. But, if this had been distinctly decided in any case, I should have felt myself bound. *But, as the authorities stand, I feel at liberty to make this [*715
distinction between "wearing apparel" and "necessary wearing apparel," and to hold that the exception of the latter does not vitiate the deed.

Then, as to the leasehold,—the deed contains a recital that the debtor "has no leasehold property except a messuage or tenement known as No. 14, Grafton Street, Bond Street, and which is held by him for a term of twenty-one years from the 29th of September, 1855, at a yearly rent of 225*l.* 5*s.*, being in fact a rack-rent, and the said property is therefore of itself of no value; and that, upon consideration of the circumstances last mentioned, it has been determined and agreed that the said leasehold property shall not at present be actually assigned by the said debtor, but that he shall enter into the covenant hereinafter contained to assign the same when required by the trustees." Then the operative part of the deed excepts "the said leasehold premises hereinafter covenanted to be assigned;" and then follows a formal covenant on the part of the debtor to assign the leasehold when thereunto required. Is the deed void because that leasehold property is excepted? Now, the whole of the effects of the debtor are required to be assigned for profitable distribution. If a leasehold at rack-rent is assigned, every one who knows anything of that description of property knows that it may become a burthen instead of a benefit to the creditors, and possibly might absorb all the other assets. The conveyancer who drew this deed, by taking a covenant to assign instead of an assignment, consulted the interests of the creditors and fulfilled the intention of the legislature, by making the debtor convey all his available property, notwithstanding the exception of the leasehold. Whatever is held at the will of the trustees, is virtually conveyed to them. I cannot think the deed *void merely because [*716
the care and skill and forethought of their conveyancer has cast round the trustees this shield of protection against that which might become a source of considerable loss.

The deed is further impeached by reason of the provision therein for the payment of costs. I have looked very carefully at the words of the deed, and I think that every one of the classes of costs therein mentioned is incidental to the management of the estate and the turning it into money and distributing it amongst the creditors,—costs which of necessity must be provided for. One part which is objected to, is, that which speaks of "any negotiations, preparations, or matters in reference to the winding up of the estate of the debtor," &c. This, it is said, may relate to former abortive attempts at winding up the affairs of the debtor wholly disconnected with the present arrangement. But, construing the language of the deed ut res magis valeat quam pereat, it means costs and expenses incidental to the winding up the estate in connection with this present arrangement. If the preparations referred to eventuated in this deed, I think the

trustees may well call that a preparation for this winding up. These three objections, therefore, in my opinion wholly fail.

As to the remaining objection,—The deed, to be a valid deed within s. 224 of the Bankruptcy Act of 1849, must be for the benefit of *all* the creditors, and all must release their debts. But it is not necessary that all who release should sign the deed. If that were so, the 224th section would have been unnecessary. We are bound to see that the deed is for the benefit of all the creditors, that all have the power of coming in under it. The deed commences in the usual manner. The parties are, the debtor of the first part, the trustees of the second part, and "the several persons, *creditors, whose *717] names, &c., are mentioned and set forth in the schedule thereunder written" of the third part,—the parties contemplated being the general body of the creditors. The debtor assigns to the trustees all his available estate and effects, subject to the exceptions already particularly alluded to. They are to convert all the property into money, and, after payment of charges, apply the residue of the proceeds "in payment to the creditors of the debts owing to them respectively, rateably and in proportion to the amount of their said respective debts, but with such and the same rights respectively as to set-off, mutual credit, lien, and priority, and in the same manner in all respects as if the estate were distributed in bankruptcy." It is, therefore, clearly, a deed for the benefit of *all* the creditors. Then comes the release, which purports to be by "the said several persons parties hereto of the third part." At the time the deed was executed by the debtor and by the trustees, there would be no names underwritten as parties of the third part. There is nothing to exclude any creditor: all had power to come in and execute the deed and so become releasing parties. There is no stipulation as to non-molestation, to bring this within any of the cases referred to. And there is a proviso, "that, in case six sevenths in number and value of the creditors whose debts amount to 10*l.* and upwards shall not, by themselves or by their respective attorneys or agents, duly execute these presents within the space of three calendar months after the date hereof, then and in such case these presents and the release hereinbefore contained to the debtor from his said several creditors, and every other article, matter, and thing herein contained, shall cease, determine, and be utterly void," &c. Six-sevenths have come in and executed the deed: and the deed, in my judgment, complies with the conditions *and *718] requirements of the 224th section of the Bankrupt Act of 1849, and is by virtue of that section to be "as effectual and obligatory in all respects upon *all the creditors who shall not have signed the deed,* as if they had duly signed the same." Six-sevenths in number and value having signed, the remaining seventh are to be taken as having signed also.

Notwithstanding, therefore, the able argument of my Brother Hayes, I feel compelled to come to the conclusion that the deed is a valid deed, and that consequently the defendant is entitled to judgment.

WILLIAMS, J., and WILLES, J., concurred.

BYLES, J.—I am of the same opinion. In Ilderton *v.* Castrique, antè, p. 106, two cases, of Ellis *v.* Ollave, 3 Salk. 60, and Feltham *v.*

Cudworth, 2 Lord Raym. 760, 3 Salk. 59, Comyns 112, 7 Mod. 10, which occurred upon the statute 8 & 9 W. 3, c. 18, are referred to by Mr. Mellish in argument, as well as Comyns's Digest, *Pleader* (2 G. 6.), and which authorities appear to me to be very much to the purpose here. By the terms of this deed, every creditor may take advantage of it: none are excluded. The requisite number having executed it, the statute releases the debtor, and he requires no better or other release. Judgment for the defendant.

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*FARNWORTH and Another *v.* HYDE. *May* 28. [*719

A mandamus will not in general be granted for the examination of witnesses in one of the British colonies, where the same end may be attained by the less expensive and less dilatory proceeding by commission.

SIR G. HONYMAN, in Easter Term last, obtained a rule calling upon the plaintiffs to show cause why a writ in the nature of a mandamus should not issue, in the usual form, directed to the Chief Justice and the other judges of the Supreme Court of Judicature at Quebec, for the examination of witnesses on the part of the defendant in this cause resident within the jurisdiction of the said court; and that the costs of and incidental thereto and of the proceedings to be taken thereunder should be costs in the cause; and that the trial should be postponed until the return of the writ. The action was upon a policy.

A summons had been taken out on the part of the plaintiffs for a commission to examine witnesses at Quebec, but was ordered to stand over to come on with the defendant's application for a mandamus.

Cohen now showed cause.—The court will not sanction the more dilatory and expensive proceeding by mandamus, when the same result may be obtained by a commission. The 1st section of the 1 W. 4, c. 22, reciting the 13 G. 3, c. 63, which authorized the issuing of writs of mandamus for the examination of witnesses in India, extends the provisions of that act to "all colonies, islands, plantations, and places under the dominion of His Majesty in foreign parts, and to the judges of the several courts therein," when it shall appear that the examination of witnesses under a writ or commission issued in pursuance of the authority hereby given will be necessary or conducive to the due administration of justice in the matter wherein such writ shall be applied for. The 4th section empowers *the court "to order a *commission* to issue for the examination of [*720 witnesses on oath at any place or places out of the jurisdiction, by interrogatories or otherwise," without the condition in s. 1. Under s. 4 the examination may be taken vivâ voce, if it be shown to the satisfaction of the court that such a mode of examination will be more advisable: Solaman *v.* Cohen, 15 Jurist 362. One of the difficulties attending the issuing a mandamus, is, that there can be no good return to the writ except the judge delivers it to a special messenger.

ERLE, C. J.—There are many reasons why we prefer a commission to a mandamus. But, at the same time, there may be circumstances which would render an examination under a mandamus more effica-

cious. Let a commission go, and a writ of mandamus also, the latter to be used only if it should be necessary. The costs to be costs in the cause unless otherwise ordered.

The rest of the court concurring, Rule accordingly.

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*721] *KING *v.* RANDALL. *June* 6.

In estimating the number and value of the assenting creditors to a deed under the 192d section of the Bankruptcy Act, 1861, secured as well as unsecured creditors are to be taken into the account.

PROCEEDINGS to outlawry having been taken against the defendant after he had obtained a certificate of protection on the filing of a deed or instrument "of conveyance, composition, and release by which his creditors agreed to accept and receive a composition of 3*s.* in the pound on their several and respective debts," payable by certain instalments, pursuant to the 192d section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134,

Joyce obtained a rule calling upon the plaintiff to show cause why those proceedings should not be set aside.

H. James showed cause, submitting that the deed was void.—It appeared that the aggregate of the debts of the defendant was alleged to be 857*l.*, and that the assenting creditors (of the required number) representing debts to the amount of 685*l.*, which would be more than three fourths; but that *secured* creditors to the value of 283*l.*, which would make the aggregate of the debts 1140*l.*, were omitted. He referred to Ex parte Godden, In re Shettle, 32 Law J. Bankruptcy 32, where it was held by the Lords Justices that secured and unsecured creditors are to be taken into the account, both being comprised in the word "creditors" in s. 192.

Joyce, in support of his rule.—Secured creditors can take no benefit under the deed. It was held by the Lord Chancellor in Ex parte Morgan, In re Woodhouse, 32 Law J. Bankruptcy 15, that by the 197th section of the Bankruptcy Act, 1861, creditors under a trust-
*722] deed *are in the same position as creditors under a bankruptcy, and therefore, if they hold security, they cannot prove without allowing the value thereof. [ERLE, C. J.—Ex parte Morgan does not conflict with Ex parte Godden. The Lord Chancellor did not mean to express any disapprobation of the rule laid down by the Lords Justices.] At all events, if creditors having security are to be taken into the account on the one side, they must also be taken on the other side. And here it appears that Robinson, a creditor whose debt was 295*l.* 15*s.*, of which 250*l.* is secured, signs the deed as an assenting creditor for the unsecured 45*l.* 15*s.* only. Applying the rule laid down by the Lords Justices equally, therefore, the required number and value of assents has been given.

ERLE, C. J.—Assuming Mr. James to be right in saying that the proportion of assenting creditors must be three fourths of the entire body of creditors secured as well as unsecured, I think Mr. Joyce is also right in saying, that, if secured creditors are taken into account on the one side, they must also be taken into account on the other. That being so, Robinson will stand as an assenting creditor for 295*l.*

15*s.* instead of 45*l.* 15*s.*, and consequently the requisite amount of assents has been given to make the deed good, if valid in other respects. The rule will therefore be absolute to stay the proceedings in outlawry,—but without prejudice to any proceedings which the plaintiff may be advised to take to set aside the deed.

The rest of the court concurring,

Rule absolute accordingly.

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*GINDER *v.* CURTIS. *June* 12. [*723

It is a matter entirely in the discretion of an arbitrator, whether he will or will not postpone the reference, in order to give one of the parties an opportunity of bringing a material witness from abroad. And the court will not interfere unless the circumstances under which he refuses to do so are such as to amount to misconduct.

WATKIN WILLIAMS, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the award made in this case should not be set aside, "on the ground of the legal misconduct of the arbitrator in proceeding with the arbitration and making his award without waiting further for the return of the defendant's witness Wright."

The affidavit upon which the motion was founded, stated that the action was brought to recover a balance of account claimed by the plaintiff to be due to him as master of the ship Queen Bee, in respect of wages and disbursements during the time he was master of that vessel on her voyage from London to Sydney in Australia, thence to China, and thence to London,—the voyage from London to Sydney being under a charter-party with the emigration commissioners for the conveyance of emigrants: That, on the 6th of August last, the cause and all matters in difference between the parties were referred to a ship and insurance-broker in London: That the principal defence to the action was that the plaintiff had forfeited all claim for wages or otherwise, by reason of his misconduct on the voyage, and particularly on the voyage out to Sydney, by habits of intemperance, and misconduct towards the emigrants, and thereby had imperilled the recovery of the money payable under the charter-party: That, prior to the action being brought, the defendant's attorney had an interview with John Wright, who was chief officer of the said ship during the said voyage, and took down in writing a statement from him, a copy of which was set out, as follows:—"I sailed as chief officer in the ship Queen Bee, under the command *of Captain Ginder, from [*724 London, on a voyage to Sydney, thence to Shanghai, and thence to London. The vessel had on board two hundred and seventy-eight emigrants and about 400 tons of general cargo. During the voyage from London to Plymouth, I observed that the said Thomas Ginder drank very freely, but was not during that period incapable of performing his duty as master. The ship left Plymouth on the 28th of September, 1860, for Sydney. During the whole of the voyage, the said Thomas Ginder was in the habit of drinking very freely in the morning, sleeping off the effects of liquor in the afternoon, and again drinking very freely in the evening. Early in March, 1861, the said Thomas Ginder showed symptoms of delirium tremens,

and on the 18th of that month he became so violent, in consequence of a severe attack of that malady, that, by desire of the surgeon, who stated that he was so delirious as to be totally unfit to fulfil his duties or be intrusted with the command of the vessel, I, with the assistance of the crew, confined him in his cabin, where he remained the whole of the voyage to Sydney: and, when the vessel arrived at Sydney on the 31st of March, he was still labouring under delirium tremens; and it was not until the 8th of April last that he was able to resume his duty, and he immediately began to resume his habit of drinking spirits freely. On the 28th of June, the vessel sailed for Shanghai, the captain drinking during the whole of the voyage. By the charter-party, under which the ship carried a cargo of coals from Sydney to Shanghai, it was provided that 10*l.* a day should be paid for demurrage. The master neglected to apply for the demurrage as it became due, and this neglect resulted in a loss to the ship of 190*l.* The vessel returned from Shanghai to London, and the master continued drinking freely the whole time, drinking during the voyage *56 gallons of brandy, besides taking the usual allowance of wine and beer. During the time the vessel was in harbour (six months), the master was ashore every day, going on shore at about 9 o'clock in the morning, and returning between 3 and 4 in the afternoon, invariably exhibiting signs of having been drinking freely. In consequence of the neglect and incapacity of the master, there was a great waste of the provisions and stores of the ship, and also considerable insubordination among the crew:" That the defendant's attorney caused Mr. Walcott, the secretary to the emigration commissioners in London, to be subpœnaed for the purpose of producing the evidence taken before the immigration board at Sydney on an inquiry before the board upon the conduct of the plaintiff as master of the said ship, and also the report of the board on such inquiry: That, at a meeting of the 29th of August last, this evidence and report were tendered, but objected to by the plaintiff's attorney: That, at a subsequent meeting, John Wright having in the meantime left England in the steamship Robert Lowe, on a voyage to San Francisco, and thence to China, the defendant's attorney intimated to the arbitrator that he should be under the necessity of applying to postpone the reference till the return of Wright to this country: That the plaintiff's attorney then offered to admit the evidence taken on the inquiry, before the immigration board at Sydney as evidence before the arbitrator, but the defendant's attorney objected to that as a substitute for Wright's evidence: That, the arbitrator proposing to read the evidence on the inquiry for his information, the defendant's attorney consented thereto: That, at a meeting held on the 27th of October for the purpose of discussing the propriety of a postponement until the return of Wright, the arbitrator, having heard the parties, postponed his *decision until the 30th, when he assented to the application, stating that he considered he had no power to proceed in the absence of evidence: That the plaintiff's attorney procured the arbitrator to make an appointment for the 11th of February last to proceed with the reference, which he did, notwithstanding the remonstrance of the defendant's attorney, and, on the authority of a case to which his attention was drawn, on the 23d of April made his award in favour of the

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plaintiff for 298*l.* 6*s.* 11*d.*, and directed that all the costs of the cause, the reference, and the award, should be paid by the defendant.

C. Pollock showed cause.—The refusal of the arbitrator to further postpone the hearing, is no ground for the interference of the court. The most that can be said, is, that he has exercised an unsound discretion. If he had waited and had heard Wright's evidence, he could not have been charged with misconduct in declining to give effect to it. Besides, Wright was examined before the immigration board at Sydney,—the evidence taken before whom was by consent read by the arbitrator: and, if Wright had been examined again, and swore to the effect stated in his examination taken by the defendant's attorney, his evidence would be contrary to what he and all the other witnesses stated on the former occasion.

Williams, in support of his rule.—The arbitrator having once postponed the reference in consequence of the absence of Wright, he was not justified in proceeding without first waiting a reasonable time for the return of that witness. [BYLES, J.—To sustain your rule, you must show something more than an erroneous exercise of discretion by the arbitrator: there must be something amounting to legal misconduct.] Hart *v.* Duke, 32 Law J. Q. B. 55, shows that the conduct of *the arbitrator here is such as would have induced the court to allow the submission to be revoked. Blackburn, J., puts it [*727 rather on the ground of misdirection.

ERLE, C. J.—I am of opinion that this rule must be discharged. An arbitrator, the selected tribunal of the parties, has a very large discretion intrusted to him. Here, the right of the plaintiff as captain of the defendant's vessel to be paid his salary and disbursements was put in issue and discussed and considered before the arbitrator. In October it was proposed that the matter should be adjourned for the attendance of the chief officer, who, it was suggested, could give material evidence for the defendant. The arbitrator, being under the impression that he was *bound* to wait, consented to do so. Being subsequently informed that he was under no legal obligation to delay proceeding, and perhaps thinking he had waited long enough, the arbitrator intimates that, if there is no more evidence forthcoming, he is ready to make his award. I am clearly of opinion that it was a matter quite in the discretion of the arbitrator: and I cannot say that he has exercised it improperly. The conduct of the captain seems to have been the subject of inquiry before the immigration board at Sydney, the result of which was that the defendant received his freight under the charter-party entered into with the commissioners. Under all the circumstances, I think the arbitrator was quite justified in saying that time enough had been allowed; and I see no ground for interfering with his discretion. In giving this judgment, I desire not to be understood as sanctioning the notion that an arbitrator is justified in refusing relevant evidence. But, under the circumstances of this case, I think the award is a valid award.

The rest of the court concurring,

Rule discharged, with costs.

*728] *PEACOCK and Another v. PURSELL. *June* 3.

A. received from B., as collateral security for a debt, a bill drawn by C. upon D., and at maturity failed to present it:—Held, that A.'s laches made the bill equivalent to payment as between A. and B.

THE first count of the declaration was upon a bill of exchange for 30*l*., payable two months after date, and drawn by one Perry upon and accepted by one Angerstein, and endorsed by Perry to the defendant, and by the defendant to the plaintiff. The second count was for goods sold and delivered.

The pleas to the first count traversed the endorsement, the presentment, and the notice of dishonour of the bill; and, to the second count, the defendant pleaded, as to 30*l*., parcel, &c., that the plaintiffs accepted and received the bill for and on account of the debt therein mentioned. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. It appeared, that, in March, 1862, the defendant, being indebted to the plaintiffs in a larger sum for goods sold and delivered, sent them the bill in the first count mentioned as part payment and the balance in cash. The plaintiffs, however, declined to receive the bill, when the defendant said, that, if they would not accept it as part payment, there could be no objection to their retaining it as collateral security. The plaintiffs accordingly kept the bill; and when it became due they neglected to present it, or to give notice of dishonour.

On the part of the defendant, it was submitted that the plaintiffs had by their laches deprived themselves of all remedy against the plaintiff.

For the plaintiffs it was insisted, that, though they might have lost their remedy upon the bill, they might still go for the consideration.

The learned judge nonsuited the plaintiffs, reserving them leave to move.

*729] *H. James*, in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiffs on the money counts, "on the ground that the non-presentment and not giving notice of dishonour of the bill, under the circumstances under which it was delivered, did not satisfy or answer the plaintiffs' claim."

Pulling showed cause.—The plaintiffs, having by their own act made the security unavailable, cannot now turn round and say that they did not receive it for and on account of the debt. In Crowe *v.* Clay, 9 Exch. 604, a lost bill was held to be satisfaction. Whether the bill was originally received for and on account of the debt, or as a collateral security, is quite immaterial: by the plaintiffs' laches it ceased to be a security, and became payment.

H. James, in support of the rule.—The question is, whether the allegation in the plea, that the bill in question was received "for and on account" of the debt, was sustained by the evidence. Conceding that there was no presentment and consequently no notice of dishonour, that is no answer to the plaintiffs' claim for the goods sold and delivered, inasmuch as they received it merely to hold as collateral security.

ERLE, C. J.—I am of opinion that this rule must be discharged. The action is for goods sold and delivered. The plea is, that the defendant delivered and the plaintiffs accepted and received a bill of exchange for and on account of the debt. The evidence is, that the defendant, being indebted to the plaintiffs for goods sold and delivered, offered them the bill in question, which the plaintiffs at first declined to receive, but, being pressed to take it as collateral security, consented to do so. Assuming that the meaning of a bill being *received "for and on account of" a debt, would operate as a suspension of the remedy for the debt during the currency of the bill, the evidence here would not support the plea if it were necessary to go to that extent. But, however the bill was received, it clearly would be payment if at maturity the money were obtained for the bill. Now, this case has eventuated in the non-payment of the bill, coupled with this fact, that, the holders having neglected to present the bill and to give the defendant notice of its dishonour, all remedy upon it is lost. The security is marred by the plaintiffs' own laches. The legal effect of taking a bill as a collateral security, is, that if, when the bill arrives at maturity, the holder is guilty of laches, and omits duly to present it and to give notice of its dishonour, if not paid, the bill becomes money in his hands as between him and the person from whom he received it. That being so, the plaintiffs' debt is satisfied. [*730

WILLIAMS, J.—I am of the same opinion. The laches of the plaintiffs in not duly presenting the bill constituted this a payment before action brought.

WILLES, J.—I am of the same opinion. When a bill is given for and on account of a debt, it usually operates as a suspension of the remedy until the maturity of the bill. But, if the creditor, when the bill falls due, is guilty of laches whereby the security becomes deteriorated or valueless, it becomes equivalent to actual payment. That state of things may be altered by agreement. The bill may be accepted in satisfaction; but that is unusual: or it may be taken for and on account, but with an understanding that the party receiving it is to have the option of suing for the debt before the maturity of the bill. Whether that would support such a plea as this, it is unnecessary to *say. By their laches the plaintiffs have converted this into a money payment. [*731

BYLES, J.—I am of the same opinion. Assuming that, notwitstanding their having taken the bill, the plaintiffs were still at liberty to sue for the debt, it is quite clear, that, as depositees of the bill, as they had the rights so they had the duties of holders. No one else could present the bill: and, as they failed in that duty, they discharged the defendant. If the defence had been properly pleaded, the matter would have been free from doubt: and there was leave reserved to amend if necessary. Rule discharged.

COPEMAN *v.* HART. *June* 12.

The fact of one item in a tradesman's bill being separated from the rest by an interval of *several years*, does not prevent its operating (if accruing within the jurisdiction of the county-court within which the defendant dwells) to take the case out of the concurrent jurisdiction clause of the 9 & 10 Vict. c. 95.

A. WILLS moved for a rule to show cause why the master should not be at liberty to tax and allow the plaintiff the costs of this action. The motion was founded upon an affidavit of the plaintiff, to the following effect:—

"1. This action was brought to recover the sum of 15*l.* 15*s.* 1½*d.* for goods sold and delivered by me to the above-named defendant, who at the time of the supply of the several goods hereinafter mentioned, and at the commencement of this suit, dwelt and resided and carried on business at Diss, in the county of Norfolk, within the jurisdiction of the county-court of Norfolk and Suffolk holden at Diss and Eye:

*732] "2. No part of the cause of action arose within the *jurisdiction of the said county-court of Norfolk and Suffolk within which the defendant dwelt and carried on business at the time of the action brought:

"3. On the 10th of October, 1861, I received from the defendant's wife a letter of which the following is a copy,—'I think the price of butter rather high; but, as my young ladies will not eat it unless it is very superior, and we cannot consume such a large quantity whilst it is good, will you object to my having from 18 to 20 lbs. to try; also 1 cwt. of best yellow soap, &c., &c. They can come by train, or by Brown, the carrier.' This letter was written from Diss, and received by me at Norwich, out of the jurisdiction of the said county-court. On the same day I fulfilled the order contained in this letter, which amounted to 6*l.* 19*s.* 6½*d.*, part of the amount recovered in this action; and the said goods were delivered by my order at the station at Norwich, being out of the jurisdiction of the said county-court, directed to the defendant at Diss, as required in the said letter; and the carriage of the said parcel was paid by the defendant:

"4. On the 29th of October, 1861, I received from the defendant's wife a letter of which the following is a copy,—'Will you send by Brown 10 lbs. of good rough Congou tea, at wholesale price (say 3*s.* 4*d.* per lb.), with a box of Elma raisins or sweet plums for puddings.' This letter was also received by me at Norwich, out of the jurisdiction of the said county-court; and in pursuance thereof I made up a parcel of goods, amounting to 2*l.* 16*s.* 1½*d.*, which was delivered, as requested, to Brown, the carrier, at Norwich, and out of the jurisdiction of the said court; and the carriage was paid by the defendant:

"5. On the 21st of December, 1861, I received a letter from the defendant's wife, of which the following is a copy,—"Will you be so *733] kind as to send by *Brown 10 lbs. of good black tea 3*s.* 4*d.* per lb., 4 lbs. whole coffee, 1 lb. candied lemon peel, 1 good red Derby cheese, 10 lbs. Hampshire bacon, 14 lbs. loaf sugar, and 4 lbs. St. Elma raisins.' This letter was also received by me at Norwich, and out of the jurisdiction of the said county-court; and in pursuance thereof I made up a parcel of goods, amounting to 4*l.* 7*s.* 4*d.* This parcel, for

some reason which I cannot recollect, did not go by Brown, but was sent by the railway, being delivered by me to the railway company at Norwich, and out of the jurisdiction of the said county-court; and the carriage was paid by the defendant:

"6. On these grounds, I say that no material part of the cause of action arose in the jurisdiction of the county-court within which the defendant dwelt or carried on business at the time of action brought.

"7. There is a balance of 13*s.* 1½*d.* included in the amount recovered in this action. Of this, 8*s.* 4*d.* arose out of the sale of some salt to the defendant several years ago from salt-works in Worcestershire for which I was agent, all of which was paid except this small balance. The remaining 4*s.* 9½*d.*, part of such 13*s.* 1½*d.*, is also the balance of another account, in which case the goods were delivered for the defendant, and by his directions, at Norwich, and out of the jurisdiction of the said county-court, and for the carriage of which the defendant paid:

"8. The said salt account was kept separate from the account of other goods which were supplied to the defendant; and payments were specifically made from time to time by the defendant on the said salt account, and applied accordingly:

"9. On the 14th of May, 1863, an order was made by Willes, J., that the plaintiff should recover his costs herein: and, on the 20th of May, an order was made *by Byles, J., that the order of the 14th of May should be rescinded, and that the plaintiff should not recover his costs in the action, and that no costs should be paid on either side." [*734

The order of Byles, J., it appeared, was founded upon an affidavit that the distance between the two places of abode was only 19 miles and 9 tenths of a mile.

The whole of the plaintiff's demand except the old balance of 8*s.* 4*d.* arose out of the jurisdiction of the Diss county-court. As to all these, the delivery at Norwich to the carrier, Brown, or at the railway station, was a delivery to the defendant. Now, by the 128th section of the 9 & 10 Vict. c. 95, in order to give the superior court concurrent jurisdiction, it must be shown that "*the cause of action* did not arise wholly or in some material point within the jurisdiction of the court within which the defendant dwelt or carried on his business at the time of the action brought." [BYLES, J.—Here, part of the cause of action (8*s.* 4*d.*) arose at Diss. Does not that bring the case within Wood *v.* Perry, 3 Exch. 442, where it was held, that, where the items in a plaintiff's bill, under 20*l.*, are so connected together as to form one cause of action, and any *one* item arises within the jurisdiction of a county-court within which the defendant dwells or carries on his business at the time of action brought, and the parties do not dwell more than twenty miles apart, the cause of action "in some material point" arises within such jurisdiction, and the superior court has no concurrent jurisdiction under s. 128, and the case falls within s. 129? As to all the rest of the goods, the defendant's right to object to them was not gone until they arrived at Diss.] That case followed Ex parte Ackroyd, 1 Exch. 479 (Grimbley *v.* Ackroyd, 4 D. & L. 701), where the court say: "We think that we ought to hold that the

*735] 63d clause does apply (whether to all *debts which could be comprised in one description in one count as for 'goods sold' or not, we need not now decide,) but, *at all events*, to the cases of tradesmen's bills in which one item *is connected* with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one entire demand." In Barnes *v.* Marshall, 18 Q. B. 785 (E. C. L. R. vol. 83), the plaintiff, a carrier and wharfinger at Swindon, agreed in writing with the defendant, living in Surrey, to carry his timber by barge to London, at 16*s.* per ton, including all charges but wharfage. It was necessary to haul the timber from the place where it lay to the wharf; and the plaintiff provided horses for the purpose when the defendant's horses were absent. The plaintiff sued in the Swindon county-court for the balance of his account for the carriage, including a separate charge for hauling; and it was held, on motion for a prohibition, that the hauling and the carriage formed one cause of action, that such cause of action was not complete until the timber was delivered in London, and that therefore the judge of the county-court had not jurisdiction under the 9 and 10 Vict. c. 95, s. 60.

ERLE, C. J.—I think you cannot get over the case of Wood *v.* Perry. The order and the delivery were within the jurisdiction of the county-court of Diss. If the several items in the account had followed consecutively, the whole would be the cause of one action: and I think the interval between the delivery of the salt and the delivery of the other articles does not sever it. Wood *v.* Perry was an action for goods sold at intervals: the action was brought for the several items, and, one item arising within the jurisdiction of the *736] county-court within which the defendant dwelt, it *was held that the superior court had no concurrent jurisdiction. Alderson, B., in delivering the judgment of the court, there says: "We laid it down in Ex parte Ackroyd, that, where a tradesman has a bill against a party for any amount, in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one continuous demand, the whole together forms but one cause of action, and cannot be divided. In other words, we held that the words 'cause of action' in this act of parliament, meant 'cause of one action,' and were not to be limited to an action upon one separate contract. Now, here, the items in this bill are thus connected together, and the whole bill forms one cause of action. Then, if so, it follows that it is a cause of action not wholly occurring within the jurisdiction of the county-court either of Brompton or of Westminster, for, a part of it occurs within the jurisdiction of Clerkenwell, where the defendant neither resides nor carries on his business. But, does it arise in some material point within the two first jurisdictions, or either of them? We think it does: and we are disposed to determine the question by laying down some definite rule, which may be easily acted upon, and to hold, that, if any one item arises within the jurisdiction of a county-court, in such a bill as this, the cause of action in some material point arises within that jurisdiction." The same rule is laid down by this court

in Bonsey *v.* Wordsworth, 18 C. B. 325 (E. C. L. R. vol. 86). There, the plaintiff was a butcher carrying on his business within the jurisdiction of the county-court of A. The defendant resided within the jurisdiction of the county-court of B. The plaintiff sued the defendant in the superior court for a bill, some of the items of which consisted of goods which *had been ordered in the A. district, but were delivered in the B. district: and it was held that the whole [*737 formed one "cause of action," and, as a part of it arose in the jurisdiction within which the defendant resided (and within 20 miles), there was no concurrent jurisdiction within the 9 & 10 Vict. c. 95, s. 128, and consequently the plaintiff was not entitled to costs. That, therefore, is one fatal objection to the plaintiff's claim to the costs here. If need was, more might be said about each order being sent by post from Diss, and each executed by delivery of the goods to the carrier or the railway at Norwich. It is, however, enough to say, that, upon the first ground, the plaintiff is not entitled to costs.

The rest of the court concurring, Rule refused.

STERN *v.* SEVASTOPULO. *June* 9.

In an action for slander, the court refused to allow the following interrogatories to be administered to the defendant,—

"1. Did you speak and publish the words laid in the declaration, or any and which of them, or any and what other words conveying the same or similar imputations against the plaintiff?

"2. When, where, and to whom did you speak and publish the words laid in the declaration?"

THIS was an action for slander. The declaration stated that the defendant falsely and maliciously spoke and published of the plaintiff, in the French language, the words following, that is to say,—1. Il a commis adultère avec une femme à son office, 38, Threadneedle Street,—2. Il couche avec son domestique Sarah,—3. Il a proposé à sa femme d'aller à Paris pour se prostituer, et de partager l'argent avec lui,—4. Il a fourni pour son mariage des documents faux qu'il a *fait [*738 venir de la Russie moyennant une somme d'argent, chose qui se fait facilement en Russie, en payant,—5. Il leur a fait croire qu'il est un homme riche,—6. Il a fait une fausse déclaration devant le Lord Mayor pour avoir le document nécessaire pour son mariage,—7. Il a maltraité sa femme,—8. Pendant que sa femme était malade au lit à l'hôtel à Paris, il a introduit un monsieur dans la chambre à coucher, l'a laissé seul avec sa femme, et a encouragé ce monsieur de prendre des libertés avec elle,—9. Il a couché avec le chien, qui en a été malade,—10. Il a occupé une chambre à part pour coucher avec des hommes,—which words in the English language are as follows, that is to say [setting out the slanderous words in English, with apt innuendos],—using the said words in an actionable sense, and meaning that the plaintiff had been guilty of unnatural crimes and other offences: By means of which several premises the plaintiff's wife left the plaintiff's house, and filed a petition in the Divorce Court for a dissolution of marriage, and Stephen Pitzipios, D. M. Miliotti,——Completa,——Avierino,——Milossowicz, Leon Benham, Aristides Xenos,——Shiff (of the firm of Charles Joyce & Co.), Leon Serena, A.

Carati,——Burges, and others, refused to have any further dealings or transactions with the plaintiff, and the plaintiff was put to expense in defending himself in the said Divorce Court, and was and is otherwise injured. Claim 3000*l.*

On the 15th of May last, the defendant took out a summons calling upon the plaintiff to show cause why he should not deliver further and better particulars of the slanders in the declaration stated, by giving the names and addresses of the person or persons to whom the same were alleged to have been spoken or published by the defendant.

*739] This summons was adjourned until the 25th, to *give the plaintiff an opportunity of applying for leave to file interrogatories; and on the 22d of May such summons was taken out, the proposed interrogatories being as follows:—

"1. Did you speak and publish the words laid in the declaration, or any and which of them, or any and what other words conveying the same or similar imputations against the plaintiff? And state fully and precisely what those words were:

"2. When, where, and to whom did you speak and publish the words laid in the declaration, and the words referred to in the first interrogatory, and each and every of them?"

The last-mentioned summons came on to be heard before Keating, J., on the 25th, when that learned judge made an order for the interrogatories, and adjourned the defendant's summons until he should have filed his answers thereto.

J. Brown, on a former day in this term, obtained a rule nisi to rescind the order of Keating, J.

Tindal Atkinson now showed cause.—That the answers, if in the affirmative, would render the party interrogated liable to a criminal prosecution, was held, in Bartlett *v.* Lewis, 12 C. B. N. S. 249 (E. C. L. R. vol. 104), to be no ground for refusing to allow the interrogatories to be put. So, in Bayley *v.* Griffiths, 31 Law J. Exch. 477, a party was held to be bound to answer interrogatories, although his answers might disclose his case. Bramwell, B., there says: "I very much doubt whether you cannot search a man's conscience as to his own case." That is going even further than it is sought to go here. [ERLE, C. J.—As a general rule, a party may interrogate his adversary as to anything that will support his own case, subject to some

*740] limitations.] In *Zychlinski *v.* Maltby, 10 C. B. N. S. 838 (E. C. L. R. vol. 100), it is laid down generally that any interrogatories are to be allowed which are relevant to the matter in issue, and which the party interrogated would be bound to answer if in the witness-box. In Rew *v.* Hutchins, 10 C. B. N. S. 829, it was held that it is no objection that the interrogatories seek to obtain from the plaintiff admissions of conversations relating to the subject-matter of the action with a servant or agent of the defendants. [ERLE, C. J.—That was an action of contract: and the matter to which the interrogatories pointed was very specific, and within the ordinary principle of a bill of discovery. Here, the interrogatories are very general.] It is difficult to conceive why, if a man may be asked whether he did or did not make a given contract, he may not also be asked whether or not he uttered certain slanderous words. If he did utter them, he

is bound to justify. [BYLES, J.—To allow these interrogatories would, I think, be very perilous. Have you any authority for such interrogatories in an action of tort?] The nearest case to be found is Zychlinski *v.* Maltby, 10 C. B. N. S. 838 (E. C. L. R. vol. 100).

J. Brown, in support of his rule.—The interrogatories sought to be administered here are entirely without precedent; and it is hardly a fit case for the exercise of the discretion of the court for the first time. [WILLES, J., referred to Shackell *v.* Macaulay, 2 Sim. & Stu. 79, Macaulay *v.* Shackell, 1 Bligh N. S. 96, where Lord Eldon entered his protest against parties being asked questions tending to criminate them.](a)

*ERLE, C. J.—I am of opinion that this rule to rescind my Brother Keating's order should be made absolute. It is an [*741 action for slander involving very gross and wide imputations alleged to have been uttered in the presence of several persons. The plaintiff proposes to put to the defendant the following interrogatories,—"1. Did you speak and publish the words laid in the declaration, or any and which of them, or any and what other words conveying the same or similar imputations against the plaintiff? 2. When, where, and to whom did you speak and publish the words laid in the declaration?" It is clear that such interrogatories as these are hitherto unexampled. The statute giving power to the common-law courts to allow these interrogatories without the parties having recourse to a bill of discovery, is a most salutary enactment, and has to a great extent furthered the interests of justice. But the legislature has been careful to draw our attention to the fact that interrogatories are not to be granted in every case,—the court must convince itself that the step will conduce to the furtherance of justice and the promotion of truth. Most of the cases which have arisen have been cases of contract, or some claim of property, or some charge of a tort of a definite nature. In each of the cases referred to,—Bartlett *v.* Lewis, 10 C. B. N. S. 249 (E. C. L. R. vol. 100), Bayley *v.* Griffiths, 31 Law J. Exch. 477, and Zychlinski *v.* Maltby, 10 C. B. N. S. 838,—a definite fact was to be inquired into which was material to the case or defence of the opposite party; and in each of them the court held that the interrogatories *might be put though the answers [*742 might tend to disclose the party's own case, or even expose him to the peril of an indictment; in which latter case he might protect himself by declining to answer. But it appears to me that this is an attempt to extend the rule to a degree that might lead to most pernicious consequences,—an extent to which, if there be no authority to warrant it, I for one should decline to become responsible for carrying it. In Mr. Day's excellent book on the Common Law Procedure Acts, 2d edit. 235, 236, Tupling *v.* Ward, 6 Hurlst. & N. 749, is referred to, to show that the courts have a general discretion in the matter of allowing interrogatories, and Moor *v.* Roberts, 3 C. B. N.

(a) See Story's Equity Jurisprudence, § 951, where it is said: "Courts of equity will not entertain a bill for a discovery, to aid the promotion or defence of any suit which is not purely of a civil nature. Thus, for example, they will not compel a discovery in aid of a criminal prosecution, or of a penal action, or of a suit in its nature partaking of such a character, or in a case involving moral turpitude; for, it is against the genius of the common law to compel a party to accuse himself; and it is against the general principles of equity to aid in the enforcement of penalties or forfeitures." For these principles numerous authorities are cited.

S. (E. C. L. R. vol. 91), to show that such interrogatories as are of a merely fishing character are not to be allowed. The unprecedented nature of these interrogatories, the nature of the action, and the absence of any special circumstances to warrant them, seem to me to afford abundantly sufficient grounds for holding that they overstep the boundary line. I do not mean to say that in no case will the court allow interrogatories in an action of slander. But, before I will consent to allow them, I must be satisfied that there are very peculiar circumstances of grievance and oppression to justify so novel a proceeding.

The rest of the court concurring, Rule absolute.

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*743] *GRAY, Assignee of JOUSIFFE, a Bankrupt, *v.* JONES and Others. *June* 2.

One who up to and at the time of the execution of a bill of sale has never been actually engaged in any trade or occupation, is properly described therein (or in the affidavit filed therewith) as a "gentleman."

THIS was an action brought by the plaintiff as assignee of one Jousiffe, a bankrupt, to recover the value of certain household furniture and effects which were claimed by the defendants under a bill of sale executed by Jousiffe on the 30th of June, 1862, whereby the property was assigned to one Wickens in consideration of an antecedent debt.

The cause was tried before Byles, J., at the sittings in London after last Hilary Term. It appeared that Captain Jousiffe, who never had had any occupation, but who styled himself a "literary man," was described in the bill of sale, and in the affidavit (dated the 18th of July) filed therewith pursuant to the statute 17 & 18 Vict. c. 36, as a "gentleman."

On the part of the plaintiff it was insisted that this was an improper description, and rendered the instrument void, Jousiffe being in fact a merchant. In order to support this assertion, evidence was given, that, in April, he was making inquiry as to where he might best purchase a certain description of goods for exportation; that, on the 11th of July, 1862, he went to a warehouse in the city and looked at some goods which he said he wanted to send to Genoa, and for which he gave an order, which, however, was never executed; that, in August he succeeded in obtaining some goods for which he paid by an acceptance of a clergyman; and that in November he went abroad,—which was the act of bankruptcy upon which the fiat issued against him, and under which he was declared a bankrupt.

*744] On the part of the defendant, it was submitted that *this was not sufficient evidence of trading: and Gale *v.* Halfknight, 3 Stark. N. P. C. 56 (E. C. L. R. vol. 3), was cited. The question then was, whether Wilkinson, the bankrupt, was a trader within the statute of bankruptcy. It appeared that Wilkinson was engaged in the Greenland whale business, but that in the year 1809 he had made a purchase of oil, but for what purpose did not appear. He also made another purchase of oil in the year 1816; but no evidence was given

on either side to show with what view either of these purchases was made, or to what purposes the oil had in fact been applied. It was also proved, that, in the year 1818, he had made another purchase of oil lying in the Greenland Docks, which he had sold again. And Abbott, C. J., said: "The expression in the statute 1 Jac. 1, c. 15, s. 2, is 'seeking his trade of living by buying and selling.' This is not a very correct expression; but, to make a man a bankrupt, it is essential that he should have sought his living by buying and selling. A man may be under the necessity of purchasing goods in order to fulfil a contract, which from accident he is otherwise unable to complete; but that would not make him a trader within the statute; for, in such a case, he does not *seek his living* by buying and selling. In this case the party made but three purchases. This is the slightest case of the kind within my experience, or at all events within my recollection." And the jury found that Wilkinson was not a trader.

In answer to a question put to them by the learned judge, the jury found that Jousiffe was a trader *at the time of the act of bankruptcy in November*. A verdict having been entered for the defendants,

E. James, Q. C., in Easter Term, pursuant to leave reserved to him, obtained a rule nisi to enter the verdict for the plaintiff, on the ground that there was no *sufficient description of the occupation of the maker of the bill of sale to satisfy the statute. He referred to the case of Tuton *v.* Savoner, 3 Hurlst. & N. 280, where it was held that "gentleman" was not an accurate description of an attorney's clerk. [*745

Pigott, Serjt., and *Dixon*, showed cause.—The evidence here clearly failed to show anything like trading on the part of Jousiffe. All it amounts to is this, that he made three attempts to induce people to trust him with goods, and that one of these was successful, at least so far as *he* was concerned: but even this occurred long after the execution of the bill of sale and the filing of the affidavit under the statute. The jury found that he was a trader in the month of November. In Sutton *v.* Bath, 3 Hurlst. & N. 382, it was held, that, where the occupation of a party to or the witness of a bill of sale is not stated, the onus of proving that such party or witness has an occupation lies on the party seeking to impeach the bill of sale on that ground. If this person had been described as a "merchant," that would have been a clear misdescription. The London and Westminster Loan and Discount Company *v.* Chase, 12 C. B. N. S. 733 (E. C. L. R. vol. 104), is precisely in point. It appeared, that, prior to November, 1860, Dickenson (the maker of the bill of sale) had, in copartnership with another person, carried on the business of a shirtmaker at Hastings and in Southwark, but had become bankrupt and was uncertificated; that, for about five weeks in April and May, 1861, he had assisted a bookseller, receiving no remuneration for his services, but only a guinea a week for personal expenses thereby incurred; that, at the date of the bill of sale, he followed no occupation; and that, on the 2d of July, he took offices in the Adelphi, where he commenced carrying on the business of a house and general agent: and it *was held, that, upon this evidence, the jury properly found that Dickenson was following no occupation at the date of the bill of sale, and therefore was properly described as a "gentleman" in the affidavit. [*746

E. James, Q. C., and *V. Williams*, in support of the rule.—It is clear that the party was holding himself out as a trader in April. The only absolute act of trading the plaintiff was able to prove, was in August: but the fair inference is that he was carrying on the same description of business with other persons. The object of the legislature, it is submitted, will be best attained by holding the description here given to be sufficient.

ERLE, C. J.—However desirous I may be to give the fullest effect to this very useful act of parliament, I cannot discover any evidence to warrant the notion that Jousiffe had any occupation at the time of the execution of this bill of sale. That being so, he is well described as a "gentleman."

The rest of the court concurring, Rule discharged.

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*747] *QUILTER *v.* JORSS and Another. *June* 4.

To justify the reception of secondary evidence of an agreement, it was proved that A., in whose possession it was, on landing at New York, was arrested on suspicion of being the bearer of secessionist despatches, and deprived of all his papers (amongst which was the agreement in question, which had reference to shipments in this country of goods intended to run the blockade at Charleston); that all were subsequently restored to him except the agreement; and that, on his making inquiry for it of the agents of the federal government at New York, he was told that it had been sent to Washington, the seat of government:—Held, that it was sufficiently shown that reasonable efforts had been made to procure the original agreement, and that therefore a copy was properly received in evidence.

THIS was an action for commission agreed to be paid to the plaintiff upon certain business to be done through his introduction.

At the trial before Williams, J., at the second sitting in London in Easter Term last, an agreement between the defendants and Messrs. Beech & Co., upon which the plaintiff's claim was founded (and which it was suggested had reference to the supply of goods for the confederates in America, and destined to run the blockade at Charleston), not being forthcoming, a copy was offered in evidence. In order to make the secondary evidence admissible, the defendant Jorss stated, that, on his arrival at New York, the Custom House authorities took possession of all his papers, under a suspicion that he was the bearer of secessionist despatches; that, ultimately, all the papers were returned to him except the agreement in question; that he had made repeated applications at New York for the agreement, but was told it had been sent to Washington; but that he had made no inquiry for it at the latter place.

On the part of the plaintiff it was submitted that enough had not been done to justify the letting in of secondary evidence of the document. The learned judge however ruled otherwise, and the copy was received.

A verdict having been found for the defendant,

Digby Seymour, Q. C., in Easter Term, obtained a rule nisi for a new trial, on the ground that the secondary evidence was improperly received.

*748] *Sir G. Honyman* and *Shaw* now showed cause.—The question is, whether reasonable endeavours to obtain the missing docu-

ment were proved to have been made. Of this the presiding judge must satisfy himself. The rule is thus laid down by Parke, B., in Alivon *v.* Furnival, 1 C. M. & R. 277, 4 Tyrwh. 751, 3 Dowl. P. C. 202,—"Secondary evidence is admissible where it is in effect out of the power of a party to procure the original;" and he goes on,—"and that was sufficiently proved in this case to the satisfaction of the learned judge, *whose province it was to decide upon this question.*" In Boyle *v.* Wiseman, 10 Exch. 647, it was held that it is no ground for admitting secondary evidence of the contents of a private letter, that the person who has possession of the letter is beyond the jurisdiction of the court, and has refused to deliver it up when requested by a person who did not disclose the purpose for which it was wanted. For the purpose of proving that the defendant was the writer of the libel, the plaintiff called as a witness the Rev. H. Ivers, a Roman Catholic priest, who deposed, that, shortly before the trial, he went to Paris, and there saw in the possession of the Abbé Cognat (the editor of a French newspaper called "L'Ami de la Religion") a letter (which was said to contain an admission by the defendant that he was the writer of the libel in question) in the handwriting of the defendant, the contents of which he was prepared to give from memory; that he asked the Abbé Cognat to let him have the letter in order to bring it to England, but that the Abbé refused. The plaintiff's counsel thereupon proposed to give secondary evidence of the contents of the letter; but the learned judge ruled that such evidence was inadmissible. The plaintiff's counsel then called the defendant himself, who had been subpœnaed: but his counsel objected to his being sworn, on the ground *that any questions put to him would [might] tend to criminate himself: and the Lord Chief Baron allowed the objection. The [*749 Court of Exchequer afterwards granted a new trial, on the ground that the cardinal ought to have been sworn. In the course of the discussion of the rule, Parke, B. says: "The question is, whether all reasonable efforts have been made to obtain primary evidence: if it had been distinctly put to the Abbé Cognat,—'It is proposed to read this letter in evidence on the trial of an action for libel, will you allow it to be placed in my hands for that purpose?' and he had refused, perhaps that might have been sufficient to admit secondary evidence." Considering the nature of this document, and the hands into which it had fallen, it was pretty evident that no amount of exertion on the defendants' part would have procured its restoration.

Digby Seymour, Q. C., and *Morgan Lloyd*, in support of the rule.—The nature of the document cannot be known until it is legitimately in evidence. To entitle a party to rely on secondary evidence of the contents of a document, the party tendering it must show that reasonable and bonâ fide exertions have been made to procure the original. In this all the authorities concur. In The Queen *v.* The Inhabitants of Kenilworth, 7 Q. B. 642 (E. C. L. R. vol. 53), on examination before removing magistrates, it was deposed, in order to let in secondary evidence of an indenture of apprenticeship (not parochial), that D. had possession of it after the apprentice's death, and had stated, in answer to inquiry, that she, D., had given it to S., the master of a workhouse in which D. was an inmate; that S. was dead, and S.'s widow had stated, in answer to inquiry, that she had searched S.'s papers,

but could not find the indenture, and had given up all the parish
*750] papers to *an assistant-overseer: and it was further deposed that the said assistant-overseer stated, in answer to inquiry, that he had examined the papers, but did not recollect seeing the indenture, and had handed over the papers to another assistant-overseer: and it was proved that this last had searched the papers, but could not find the indenture: that the master and matron of a workhouse in which D. (after the inquiry first stated) had died, stated that no papers were found in D.'s possession at her death; that the widow of the solicitor who prepared the indenture stated that her husband's papers were in the possession of P.; and that the said papers in P.'s possession were searched, but the indenture could not be found. On this proof, the magistrates (and afterwards the sessions, on appeal) received the secondary evidence. And the Court of Queen's Bench held that the magistrates and sessions were to judge for themselves whether the proof of bonâ fide search was satisfactory; and that they would not disturb their conclusion without seeing that it was one which they could not legitimately come to. All that was shown here, was, that Jorss, having been deprived of the document by the authorities at New York, was told when he demanded its restoration that it had been sent to Washington; and there he left it without making any further effort. Having been informed that the document had been forwarded to the seat of government, it was perfectly idle to repeat his applications to the authorities at New York.

ERLE, C. J.—I am of opinion that this rule should be discharged. At the trial secondary evidence of an agreement was admitted by the learned judge, the original being in America. The question is, whether reasonable exertion was shown to have been made to procure
*751] the proper evidence. We have a right to *know what the document is, in order that it may be identified. This document was an agreement between the defendant and certain persons trading under the style of Beech & Co., and had reference to the shipment of goods to be conveyed to the port of Charleston, in South Carolina, whilst that port was in a state of blockade; and the excuse for its non-production is, that it had been seized by the officers of the federal government at New York. It appears that Jorss being supposed to be the bearer of confederate despatches, on his arrival at New York the hand of the law was laid upon all his papers; that, after an interval, some of his papers were restored to him; but that this one was not. I agree with the plaintiff's counsel, that, being told that the document had been forwarded to Washington, it was idle to reiterate the demand for it at New York. It is to be observed, too, that the communication between New York and Washington is not very difficult. On the other hand, the nature of the document makes it very unlikely that it would be given up: and it may be that the learned judge was fully justified in concluding that Jorss had no better chance of getting it if he had gone to Washington than he had by remaining at New York: and, unless I felt perfectly clear that the learned judge was wrong in receiving secondary evidence, I could not consent to a new trial. Upon the whole, I think he was right.

WILLES, J.—I am of the same opinion. I think no other means could have been reasonably expected to be resorted to for procuring

the document in question than those which the defendant did adopt. No doubt, if secondary evidence had been improperly received, it would amount to misdirection. I think the evidence was properly admitted.

*BYLES, J.—I agree with my Lord and my Brother Willes that the secondary evidence was properly received here. It [*752 is plain, that, if it had been improperly received, we could not have refused a new trial: see the observations of Parke, B., in Crease *v.* Barrett, 1 C. M. & R. 932, 933. It may be that that rule does not apply where the question arises on some collateral matter: but it clearly does to a case like this.

WILLIAMS, J.—I am of the same opinion: and I beg to say, that, if I was wrong in admitting secondary evidence of this agreement, because sufficient endeavours had not been made by the party to procure the original, the plaintiff would have been entitled to a new trial. If this had been a case where the evidence in question exclusively applied to an aspect of the case which became immaterial, I think the verdict ought not to have been disturbed, even if I was wrong. But this is not a case of that sort. I think, however, the evidence was properly admitted, because I think the defendant had done all that was necessary to endeavour to procure the primary evidence. Secondary evidence is admissible in all cases where it appears that it is the best which, without default, it is in the power of the party to furnish. Did the defendants do enough here to warrant the judge in saying that the production of the original document was impossible? It was proved that Jorss had the agreement in his possession at New York, where he was arrested on the ground that he was the bearer of secessionist despatches; that all his papers were taken from him, but were all ultimately returned to him except this one, which, on his inquiring for it of the agents of the government at New York, he was told had been sent to Washington. When asked if he had made any efforts to obtain the document from Washington, he said he *had not, but had contented himself with making [*753 his demand upon the authorities at New York. It seemed to me not to be reasonable to say that the party was bound to go to Washington to look after the paper, and that enough was done to justify me in admitting the copy. The amount of effort required would probably vary with the nature of the document. It may be, that, where it is the very foundation of the action, a greater amount of diligence to procure the best evidence would be required than if it were merely ancillary. But it is unnecessary to decide that. Suffice it to say that there was proof here that reasonable efforts to procure the original had been made, and therefore that the secondary evidence was properly received. Rule discharged.

VYNER *v.* THE MERSEY DOCKS AND HARBOUR BOARD.

June 5.

In 1830, the plaintiff obtained from the Crown a grant in fee-simple of certain lands in the county of Chester. In 1853, the Birkenhead Docks commissioners obtained from the commissioners of woods and forests a conveyance of the same lands, upon which, under the sanction of various acts of parliament (to some of which the plaintiff was an assenting party), the dock commissioners proceeded to construct docks and other public works. In 1855, all the rights and privileges of the Birkenhead Docks commissioners were by act of parliament, transferred to and vested in the corporation of Liverpool, and, by subsequent acts of parliament, from the corporation to the Liverpool Dock commissioners, and ultimately to the defendants the Mersey Docks and Harbour Board:—

Held, that the conveyance of 1853 could not divest the estate which had vested in the plaintiff under the grant of 1830; and that the subsequent acts of parliament created no statutable title either in the dock commissioners or in the defendants.

THIS was an action of ejectment. The action was, in the first instance, commenced by the plaintiff to recover possession of four small pieces of land, parcel of or immediately adjacent to Wallasey Pool, an inlet from the west or Cheshire side of the river Mersey, which upon a plan annexed to the writ were marked A., B., and C., and
*754] were coloured respectively brown *and yellow, containing respectively the quantities therein mentioned.

The cause came on for trial at the Cheshire Spring Assizes in 1861, before Channell, B., and a special jury, when by consent the following order was made, and a verdict was thereupon entered for the plaintiff:—

"It is ordered, &c., that a verdict be entered for the plaintiff, subject to a special case, to be stated by Mr. Knowles, who shall determine all questions of fact in this cause, and raise all questions of law which may be required by either party. It is also ordered, that this ejectment shall be considered as including, in addition to the lands in the writ mentioned, all the property which is common to the grants from the crown to the plaintiff and to the Birkenhead Dock trustees respectively, excepting Nos. 7 and 8 in the grant to the plaintiff, and also excepting two plots of land on the south side of the Pool, and on the east side of Wallasey Bridge, and lying landward of the dock-wall built by the plaintiff."

Pursuant to this order, the arbitrator or referee in the said order named, having been duly attended by counsel on both sides, and having heard and considered the evidence on oath of the witnesses produced before him, found and determined all questions of fact in this action in the manner stated in the following case:—

1. The plaintiff is lord of the manor of Bidston, in the county of Chester, and joint lord with Harold Littledale, Esq., of the manor of Wallasey, and is the owner of an estate of about 3000 acres of land in (amongst others) the several townships of Bidston, Wallasey, and Poolton-cum-Seacombe, in the immediate vicinity of and partly abutting on Wallasey Pool, part of which Pool, within the townships of
*755] *Birkenhead, Bidston, and Poolton-cum-Seacombe, is now converted, under the powers of some of the acts hereinafter mentioned, into the Great Float, with wharves on both its sides.

2. The defendants are the Mersey Docks and Harbour Board mentioned in and incorporated by the 20 & 21 Vict. c. clxii., for con-

solidating the docks at Liverpool and Birkenhead into one estate, and for vesting the control and management of them in one public trust.

3. The pieces of land the right to the possession of which is now in question, are,—first, the plot of land coloured brown and marked A. upon the plan No. 1 (appended to the case), and containing 530 square yards,—secondly, the plot of land also coloured brown and marked B. on the same plan, and containing 1862 square yards,—thirdly, the two plots of land coloured yellow and marked C. on the same plan, containing 1121 square yards,—and fourthly, all that piece of land (formerly part of the bed of Wallasey Pool) coloured dark green on the plan No. 2 in the appendix, which is included within the yellow boundary and also within the pink boundary, respectively delineated upon the same plan, save the plots mentioned in the second exception contained in the order of nisi prius.

4. The four plots marked respectively A., B., and C. upon the said plans No. 1 and No. 2, are now parcel of a quay or wharf formed upon the margin of the Great Float by the defendants, professing therein to act under the provisions of the statute the short title of which is, "The Mersey Docks and Harbour (Works) Act, 1858." Plot B. was, as to its site, originally part of the bed of the Pool, and, as it now is, was formed of excavations taken from the bed of the Pool and elsewhere, and deposited on the said site; and plot B., together with plot A., have been appropriated *by the defendants for and are now used as a free public wharf, for the benefit of the parishioners of Wallasey in connection with and as part of the works authorized by the last-mentioned act. [*756

5. The several acts of parliament relating to the construction of the Birkenhead Docks, namely, the 7 & 8 Vict. c. lxxix., 8 Vict. c. iv., 10 & 11 Vict. c. cclxiv., 10 & 11 Vict. c. cclxv., 11 & 12 Vict. c. cxliv., 13 & 14 Vict. c. c., 16 & 17 Vict. c. clxv., 17 & 18 Vict. c. cxcii., 18 & 19 Vict. c. clxxi., 20 & 21 Vict. c. clxii., 21 & 22 Vict. c. xc., and the 21 & 22 Vict. c. xcii., and also all the documents contained in the appendix, were to be referred to as part of the case.

6. Prior and up to the year 1815, Wallasey Pool, which is partly within Birkenhead, partly within Poolton-cum-Seacombe, partly within Wallasey, and partly within Bidston, all in the county of Chester, consisted at low-water of a narrow stream running in a somewhat deep gully in mud, with mud flats on each side, which at high-water were overflowed by the tide of the river Mersey. The Pool was of very irregular shape; and it extended from a small bridge called Warrington's Bridge, its extreme western limit, where it received the waters of the river Birkett, to the river Mersey. The quantity of water in the Pool at low tide varied very much, the river Birkett occasionally bringing down a considerable volume of water, whereas at other times there was at low-water a mere brook. All the land abutting on the south side of the Pool, from Warrington's Bridge down to and for a short distance below the side of the present Wallasey Bridge, was and is still the property of the plaintiff; and he was and still is also the owner of a considerable quantity of land on the north side of the Pool.

7. In the year 1815, the plaintiff, at his own cost, constructed across

*757] the Pool, on the site of the present *Wallasey Bridge, an embankment of earth, with the object of shutting out the tide from flowing above to the westward of the same embankment. This embankment (hereinafter called "the embankment of 1815") was constructed with an iron culvert through it, having on the lower or eastern end of the culvert a self-acting flap or door which closed with the action of the flood-tide, but was opened by the fresh water above when the tide receded. The effect of this embankment of 1815 was, to exclude the tide from the upper or west end of the Pool; but, notwithstanding the exclusion of the tide, there was at high-water tide times an increase of water in the upper or west end of the Pool, as the water of the river Birkett had no means of escape during the time when the flap or door was closed by the tide. The embankment of 1815 ran across the Pool in the same line as the site of Wallasey Bridge, shown on the plan No. 2, and was continued towards the south until it joined and intersected the line of an ancient embankment which extended in a very irregular line on the south side of the Pool from Warrington's Bridge down to and below the embankment of 1815. The course of the ancient embankment was shown by double dotted lines upon the plan attached to the plaintiff's grant of 1830, hereinafter referred to.

8. Under the provisions of an act of parliament passed in the year 1814, for enclosing the waste or common lands in the townships of Wallasey and Poolton-cum-Seacombe, an award was made, in the year 1823, by the commissioner acting under that act, by which certain allotments, which on the plan No. 2 were marked Nos. 37, 38, and 39, and were edged with pink dotted lines, were allotted to the plaintiff, in fee, in respect of his ancient freehold estate in the said township

*758] of Poolton-cum-Seacombe; and, since the *years 1815 and 1823 respectively, the plaintiff and his tenants have paid all tithes, rates, and taxes charged upon all the lands coloured light green on plan No. 2, and also on all such parts of the lands coloured dark green on the same plan as have been charged therewith. Under this enclosure act, the commissioner made allotments of common land to the several owners of all the old enclosed land in the manor and township of Wallasey; and, in estimating the respective quantities to be so allotted, the lands in respect of which the allotments were made were measured and estimated as extending down to the low water channel of Wallasey Pool, from the eastern boundary of the same manor and township, near Wallasey Bridge, to Warrington's Bridge.

9. In the month of April, 1829, an act of parliament (10 G. 4, c. xvi.) was passed, intituled "An act for making an embankment on the north-west side of the leasowes in the townships of Wallasey and Great Meols, in the county of Chester, to prevent the further encroachment of the sea, and the injury to arise therefrom to the low lands contiguous, and to the port of Liverpool." The said act gave power to the commissioners to impose rates, one half thereof to be paid by the corporation of Liverpool, whose liability in respect thereof has been transferred by act of parliament to the defendants, the Mersey Docks and Harbour Board, and the other half thereof by the owners of the said low lands, to be applied for the purposes of the act. The first rate made under the authority of this act was made in

the year 1831; and the plaintiff was thereby rated as owner of several hundred acres of land, including about one-half of all the land now in question, which is common to the Crown grants made to the plaintiff and to the Birkenhead Dock trustees respectively. The residue of the land now *in dispute, both above and below [*759
Wallasey Bridge, and other lands of the plaintiff adjoining, not in dispute, were not included in the rate, by reason of those lands being frequently covered with water, and having in the words of the act (s. 34) no annual value to let. The annual amount of this embankment-rate has been 15*s.* per acre per annum, or thereabouts, and has been paid by the plaintiff, year by year, from the year 1831 to the present time, save that since the year 1858 the defendants have paid the same rate in respect of so much of the plaintiff's land as they have obtained possession of as hereinafter stated. Since the passing of this act of parliament, and up to the passing of the Mersey Docks and Harbour Act, 1857, the corporation of Liverpool were the owners of certain tracts of land abutting on the shores of Wallasey Pool liable to this embankment-rate, and have paid the same rates from time to time to the annual amount of 55*l.* or thereabouts.

10. By deed bearing date the 17th of December, 1830, William Dacres Adams, and Henry Dawkins, Esqs., two of the commissioners of woods, &c., in consideration of 3000*l.* by the plaintiff paid to the account of the woods and forests, granted on behalf of the Crown to the plaintiff, his heirs and assigns, all the estate, right, and interest of the Crown, of, in, and to certain pieces of land therein described as follows,—"All those eight pieces or parcels of marsh land, and channel or drain, containing 54*a.* 0*r.* 4½*p.* or thereabouts, lying and being between the high and low-water mark, in a creek in the river Mersey called Wallasey Pool, in the parishes of Wallasey and Bidston, in the county of Chester, and which are delineated and particularly described in the plan inserted in the margin hereof, numbered thereon, 1, 2, 3, 4, 5, 6, 7, and 8, and containing respectively, 1*a.* 2*r.* 22*p.*, *39*a.* 2*r.* 0*p.*, 29*p.*, 2*a.* 0*r.* 7½*p.*, 2*r.* 6*p.*, 5*a.* 0*r.* 23*p.*, 2*a.* 0*r.* 5*p.*, and [*760
2*a.* 3*r.* 32*p.*, or thereabouts." The plan inserted in the margin of this grant has not the points of the compass marked upon it, but the western limit of the Pool is on the right hand of the plan. The double dotted lines on the plan, on the south side of the Pool, are intended to denote the course of the ancient embankment already alluded to, and the double dotted lines across the Pool, the site of the embankment of 1815. The plots numbered 7 and 8 on this plan are, by the terms of the order of nisi prius, excluded from the action. These plots were, in the year 1857, given in exchange by the plaintiff for other lands in the township of Poolton-cum-Seacombe.

11. This grant was duly enrolled on the 12th day of February, 1831, under the 10 Geo. 4, c. 1, and is in the Crown Lands Office, Spring Gardens.

12. In the years 1831 and 1832, the plaintiff constructed on the south side of the Pool a new embankment, extending from Warrington's Bridge down to the embankment of 1815 (the present site of Wallasey Bridge). This new embankment (hereinafter called "the embankment of 1831") is shown upon the plan No. 2, extending from the letter D. to the letter F., and is described thereon as "Embank-

ment made by Thomas Craven, &c." The earth and soil for making this embankment, and the earth and soil afterwards used for raising and repairing the same, were got from land lying between this embankment and the low-water channel.

13. From the year 1815 to the construction of the embankment of 1831, all the land between the ancient embankment and the low-water channel of the Pool, and also the land coloured light and dark green on the plan No. 2, to the east of Wallasey Bridge, and on the Bidston side, were used and occupied by the plaintiff's *yearly
*761] tenant of the Bidston Marsh farm adjoining, and principally used as a ley for cattle. The Bidston Marsh farm was always, during the period aforesaid, separated from the adjoining chapelry of Birkenhead by a fence of the plaintiff which ran along the boundary line shown on plan No. 2 down to the low-water channel. In the year 1832, the plaintiff's tenant of Bidston Marsh farm was allowed out of his rent a sum of 21*l.* in respect of 8*a.* 2*r.* 17*p.* of land damaged by the excavation and other work in forming the embankment of 1831. The measurement of these 8*a.* 2*r.* 17*p.* was carried down to the low-water channel of the Pool. The embankment of 1831 was, in or about the years 1834 and 1837 respectively, raised and enlarged by the plaintiff, and has since on various occasions been altered, improved, and repaired by the plaintiff, at his sole expense.

14. From the year 1815 to the year 1832, the lands west of Wallasey Bridge, on the Wallasey side of the low-water channel, coloured respectively light and dark green on the plan No. 2, were used by yearly tenants of the plaintiff for grazing, and, in the years 1829, 1830, 1831, and 1832, partly for tillage. After the year 1832, when the tidal water was re-admitted, the whole of the land coloured dark green on the Wallasey side, at each tide of the height of 15 feet 6 inches above the old dock sill at Liverpool, was covered with water, and the parts coloured light green, and also the parts coloured dark green when not affected by the tides, were from that time until the construction of the works and the penning up of the water, hereinafter stated, let to and occupied by yearly tenants of the plaintiff.

15. In the year 1832, the plaintiff commenced the erection of a bridge across the Pool, on the site of the embankment of 1815; but, before the completion of *this bridge, a high tide broke through
*762] the stank or dam at the works, and washed it away, together with a portion of the bridge; and from that time the tide again freely flowed in the whole of the Pool, and continued so to do until, by the construction in the year 1848 of a temporary dam at the east end of the Pool, the tide was again shut out. About the same time, that is, in 1832, the plaintiff erected the present Warrington's Bridge at his own cost. In the year 1842, the plaintiff sold and conveyed to the Wallasey Bridge Company the site of that bridge and the works as they then were, and land for the road, for the sum of 200*l.* The company thereupon built the present bridge, and formed the road to and over the same, and have been in undisturbed possession thereof to the present time.

16. It was proved on the part of the plaintiff, that the plots A., B., and C., and so much of the other lands now in question as are situate on the east side of Wallasey Bridge, and down to the low-water chan-

nel of the Pool on the Wallasey side, were included in and formed part of certain land which by agreements made respectively on the 30th of January, 1836, 10th of December, 1838, and 19th of February, 1840, were let by the plaintiff to tenants at annual rents. The same lands had previously, from the year 1824 to the year 1835, been occupied, so far as the same were respectively capable of occupation, by the plaintiff's tenants, as part of a farm called Poolton Wharf farm. Such tenants or some of them erected wharves thereon. In 1851, a tenant of the plaintiff erected a landing-stage within the creek marked C., for landing coals and other goods, and used the same for about twelve months. It was also proved, that, in the year 1854, the tenants of some adjacent property, not belonging to the plaintiff, enclosed with posts and rails a portion of the creek marked C., and that the fence so *erected was shortly afterwards re- [*763
moved by the plaintiff's agent. It was proved that no proceedings were taken against the plaintiff in consequence or by reason of the removal of this fence.

17. It was contended before the referee on the part of the plaintiff, that the manor of Bidston, of which the plaintiff is lord as aforesaid, includes the whole township of Bidston, and that the manor of Wallasey, of which the plaintiff is joint lord as aforesaid, is conterminous with the township of Wallasey, and that the low-water channel of Wallasey Pool forms the boundary between the townships and manors of Wallasey on the north and Bidston on the south. In addition to the other facts in that behalf stated in this case, it was proved by Mr. John Davies, the land agent of the plaintiff, that the said low-water channel forms the boundary between the said respective townships, and that there are evident marks upon the ground, that formerly, and before the construction of the ancient embankment already mentioned, Wallasey Pool extended nearly a mile above or to the westward of Warrington's Bridge, and that the old water-line above Warrington's Bridge forms the boundary of the respective manors as well as of the townships, and was so treated by the commissioner under the Wallasey Enclosure Act mentioned in paragraph 8 of this case; and that, on the occasion of that enclosure, allotments were made to the plaintiff and to John Egerton, Esq., then joint lords of the manor of Wallasey, in respect of the lord's rights. The same witness also proved that he had known the same manors and townships ever since the year 1814, he having upon the occasion of the said enclosure acted as clerk of the commissioner, and in that capacity, in the year 1816, he made the survey, measurement, and valuation of the whole manor and township of Wallasey, upon which survey, measurement, *and valuation the said allotments were made. [*764
In the year 1829, the witness became and had ever since been the land agent of the plaintiff; and he, the witness, always considered the boundary of the respective manors to be the low-water channel of the Pool, and he had dealt with the properties on both sides of the Pool in Wallasey and Bidston on that footing. Upon this evidence being given, it was objected on the part of the defendants that in point of law the facts in that behalf respectively hereinbefore stated and deposed to by the said Mr. Davies, did not constitute any evidence

proper or sufficient to be submitted to a jury, to rebut the legal presumption that the lands lying between high and low-water mark in Wallasey Pool were not parcel of the said manors respectively, but were the property of the Crown. On all the facts in this case stated, and there being no evidence to the contrary, the referee found that the manors of Bidston and Wallasey include the whole of the townships of Bidston and Wallasey respectively, and that the low-water channel of Wallasey Pool is the boundary between the manors and townships of Wallasey on the north and Bidston on the south. He stated the evidence on which he had come to this conclusion, the defendants having required him to raise upon the case the question of law above mentioned for the consideration of the court.

18. In the month of November, 1843, preparatory to the application to parliament in the following session for the act hereinafter next mentioned, a plan and book of reference were deposited with the clerk of the peace for the county of Chester, copies of which were set out in the appendix.

19. In the year 1844, the 7 & 8 Vict. c. lxxix., intituled "An act for constructing tidal basins, a dock, and other works at Birkenhead, in
*765] the county of *Chester, and for other purposes" (being the first of the Birkenhead Dock acts), was passed, whereby certain persons who under a prior statute had been appointed commissioners for the improvement of the township of Birkenhead were directed to be called "The Commissioners of the Birkenhead Docks," and they were by s. 125 empowered to construct a sea-wall adjoining the river Mersey, across the eastern limits or entrance of Wallasey Pool; and also to construct an embankment across the Pool, for the purpose of penning up the waters of the Pool between the western side of the last-mentioned embankment and Warrington's Bridge. And, in order to carry off the water which would otherwise flow into the Pool at Warrington's Bridge, the commissioners were authorized to construct a drain running for the main part through the adjacent lands of the plaintiff to the eastern side of the intended works. The 55th section of this act is as follows:—"And whereas Her Majesty, in right of her Crown, is or claims to be entitled to the fundus or soil between high and low-water mark of the said Pool called Wallasey Pool, and of the Cheshire shore of the river Mersey adjoining the eastern limits of the said Pool: And whereas it is expedient that the commissioners of Her Majesty's woods, forests, &c., shall be empowered, with such consent as hereinbefore mentioned, to grant all the estate, right, title, and interest of Her Majesty, her heirs and successors, of and in so much of the said fundus or soil of the said Pool and river as will be required for the purposes of this act, or any purposes consequent on the passing of this act: Be it therefore enacted, that it shall be lawful for the commissioners for the time being of Her Majesty's woods, forests, &c., and they are hereby authorized and empowered, with the consent in writing of the lord high treasurer, or commis-
*766] sioners for executing the *office of lord high treasurer, of the United Kingdom, or any three of them, to give and grant to the said commissioners for executing this act, all the estate, right, title, and interest of Her Majesty, her heirs and successors, of and in

so much and such parts of the soil and shore of the said Pool and river as they shall deem it expedient to give or grant to the said commissioners, without taking any consideration in money for the giving or granting thereof; and in such case the estate, right, title, and interest of Her Majesty, her heirs and successors, of and in the residue of the said soil and shore, shall remain vested in Her Majesty, her heirs and successors, as parcel of the possessions and land revenues of the Crown within the ordering and survey of the Court of Exchequer in England, as if this act had not been passed: and any such grant, to be made as aforesaid, shall be subject to such stipulations, restrictions, and provisions, as to the appropriation and enjoyment of the land granted, as the said commissioners for the time being of Her Majesty's woods, forests, &c., shall think fit; and all such stipulations, restrictions, and provisions may at all times hereafter be enforced in a court of equity, by or at the instance of the said last-named commissioners: Provided always, that, if the said sea-wall, embankments, and tidal basins or harbours in this act mentioned shall not be constructed within ten years from the passing of this act, or shall at any time be discontinued, and the use thereof for the purposes of this act shall be abandoned, all such land, soil, and shore now belonging to Her Majesty in right of her Crown as shall have been granted, taken, or used for the purposes of this act, shall revert to Her Majesty, her heirs and successors, and any grant made in pursuance of the powers hereby given shall determine and be void."

*20. The plaintiff, being the owner of the land proposed to be taken for the purposes of the new drain or culvert from Warrington's Bridge, and being also the owner of lands affected by the proposed penning up of the water of Wallasey Pool, had formal notices of the intention to apply for the act. The plaintiff presented a petition to the House of Commons against the bill, with the view of entitling himself to be heard before the committee on clauses; he being desirous to help forward rather than obstruct the scheme as a whole. The plaintiff raised no objection to section 55, nor did he give notice of or make any claim whatever to the bed of the Pool, or any portion of it; but there was no evidence before the referee that the plaintiff had his attention called to this section, or had any notice of any adverse claim by the Crown, except so far as such notice might be inferred from the contents of the act itself. On the insertion of section 136 of the act, relating to the diversion of the drain through the plaintiff's land, and section 147 empowering him to erect bridges over the drain, the plaintiff withdrew his opposition to the bill. The plan and book of reference hereinbefore mentioned, are referred to in and by section 140 of the act, and the additional map or plan by the said section required to be deposited was duly deposited accordingly. [*767

21. On the 4th of November, 1844, an agreement was entered into between the commissioners of Her Majesty's woods and the Birkenhead Dock commissioners, that the Crown should grant, free of charge, to the Birkenhead Dock commissioners, all its rights in 150 acres of the bed and shores of Wallasey Pool, and the creeks and bays thereof. All the plots or pieces of land now in question, save the plots A. and C., were and are included in the 150 acres so agreed to be granted.

*768] A copy of this grant and also of a *previous grant from the Crown to the said commissioners, dated the 17th of September, 1844, referred to in the said agreement, were set forth.

22. By clause 3 of this agreement, it is provided that the Birkenhead Dock commissioners shall apply to parliament in the next session, to vest the said 150 acres in them, in trust for public uses, in a manner to be settled by parliament. No act was obtained or applied for in the next session, save the act 8 Vict. c. iv. hereinafter referred to.

23. The Birkenhead Dock commissioners, in the month of November, 1844, caused a plan and book of reference to be deposited with the clerk of the peace for the county of Chester (copies of which were in the appendix), and gave the usual notices preparatory to an application to parliament in the session of 1845, for power to construct wharf or sea-walls along both sides of Wallasey Pool, from the mouth or eastern extremity thereof up to Wallasey Bridge. In the plan and book of reference so deposited, the whole of the lands sought to be recovered in this section, save plot A., are scheduled as being the property of the Crown. Plot A. is delineated upon the plan, but is not numbered thereon, nor mentioned in the book of reference. On the 4th of February, 1845, the plaintiff, by Mr. John Davies, his agent, after inspecting the deposited plan and book of reference, wrote a letter to Mr. Joseph Mallaby, the clerk and solicitor of the Birkenhead Dock commissioners, of which the following is a copy:—

"Mollington, 4th February, 1845.

"Dear Sir,—Mr. Vyner has desired me to write to you respecting the short lengths of proposed dock wall which are within his property on the sides of Wallasey Pool, near Poolton Bridge, to request that the lines of wall to be defined by the act may stop at his boundary,

*769] leaving him to continue them within his property as *he may deem best. Not having received any notice respecting his frontage within Bidston, Mr. Vyner was not fully aware of the intention of continuing the line of wall beyond Birkenhead boundary, until, at his request, I last week looked into the plan, &c., left with the clerk of Bidston, and found the line produced within Bidston up to Poolton Bridge, but no further; and that, in the book of reference, Mr. Vyner's frontage on this part of the line is called the property of 'the Crown and William Jackson, John Laird, William Laird, and M'Gregor Laird,' to whom probably the notices respecting that frontage have been given. I respectfully beg to mention, that, west of his boundary, Mr. Vyner is owner on both sides of the Pool, so that any direction he may give to the walls there will only affect himself; that the shores on both sides belong to Mr. Vyner from high-water mark to the centre of the channel, he having several years ago purchased all the Crown rights thereon; and that, as it is not proposed to define the line of wall alongside of all Mr. Vyner's land abutting on the Pool, there is the less need to define it along part; but that, as nine-tenths are to be left to himself, the remaining tenth may as well be left to him also. But perhaps I need not thus trouble you, and that I am right in thinking that it was only intended to carry the line of wall to the extent of Mr. Jackson's land, and that it was taken up to Poolton Bridge, under the impression (as appears by the book of

reference) that so far belonged to Mr. Jackson and his friends. In either case you will oblige Mr. Vyner by abandoning and leaving to him the line of that part of the wall which is within his limits. The favour of an answer for Mr. Vyner will oblige, JOHN DAVIES."

This letter Mr. Mallaby answered by a letter of the *6th of February, 1845, of which the following is a copy:— [*770

"1, Derby-street, Parliament-street,
"6th February, 1845.

"Dear Sir,—The plan deposited is not a plan prescribed by us, but by the Crown; and we cannot abandon any portion of it. If Mr. Vyner can succeed in persuading the Crown to stop the wall at his land, we should be glad to consider the subject with him; but, in that case, he would lose the immense advantage of having the Pool deepened and dredged opposite to the wall fronting his property. The bill is to authorize the commissioners to make the walls according to the plan; and, if the land-owner adjoining will pay the expense of making so much of the wall as lies opposite to his property, the wall will vest absolutely in him, subject to repairing, and he will be entitled to have deepened the Pool opposite that wall at the expense of the commissioners, and thus have a dock made for him. I have no doubt you are right about the land in Bidston; but it is not now intended that the commissioners should have power to take the land behind the wall, and it has therefore become immaterial. The commissioners will, however, require the land (the slip of waste) in Poolton through which the wall on that side runs. I intended to have called on Mr. Vyner and Mr. Bicknell; but I will not now do so until I hear from him, as you will no doubt communicate all to him. We should be very glad to have an opportunity of concurring with him in any ulterior views, and we think this is the grand stepping-stone for him. JOSH. MALLABY."

24. On the 10th of February, 1845, in consequence of these letters of Mr. Davies and Mr. Mallaby, the plaintiff accompanied Mr. Bicknell, his solicitor, to the office of the commissioners of woods, and saw Mr. *Milne, one of the commissioners of woods, who referred them to Mr. Pemberton, the solicitor of the commissioners. The plaintiff then objected to the proposed sea-wall being carried within the property he had so purchased from the Crown in 1830. He produced his grant from the Crown of the 17th of December, 1830, to Mr. Pemberton, who examined the same; and the plaintiff and his solicitor afterwards, on the same day, had an interview with Mr. Mallaby, and obtained from him explanations on the subject. Afterwards, on the 25th of February, 1845, the plaintiff and his solicitor attended on Mr. Gore, one of the commissioners of woods, and inspected the agreement of the 4th of November, 1844, between the commissioners of woods and the Birkenhead Dock commissioners. The plaintiff's solicitor afterwards attended on Mr. Mallaby; and at that meeting, Mr. Bicknell and Mr. Mallaby conferred fully on the bill then before parliament, and the plaintiff's grant from the Crown; and Mr. Mallaby thereupon engaged to prepare clauses restricting the Birkenhead Dock commissioners from taking any of the plaintiff's land west of Wallasey Bridge, allowing land-owners to make entrances through the sea-walls to their lands, and saving the plaintiff's rights [*771

generally. Three clauses were accordingly prepared by Mr. Mallaby, and submitted to and approved of by the plaintiff's solicitor, and were inserted in the bill then before parliament, and constitute sections 9, 19, and 24 of the act as passed. The plaintiff had previously presented a petition against the bill; but, upon these clauses being inserted, he withdrew his opposition, and the bill passed, and became the act 8 Vict. c. iv. hereinbefore referred to. The sections 9, 19, and 24 are as follows:—

Section 9. "And be it enacted that nothing in this act contained
*722] shall extend to authorize the commissioners *to purchase, take, or use any lands belonging to Robert Vyner, Esq., on the north-west side of Poolton or Wallasey Bridge aforesaid, without the consent of the said Robert Vyner or his heirs or assigns first obtained."

Section 19. "And be it enacted that it shall be lawful for the several persons or corporations who shall have purchased at and for a sum in gross any portion of the said sea-walls under the provisions of this act, or the respective heirs or assigns of such persons, or successors or assigns of such corporations, at their own expense, and after giving three months' notice to the commissioners of their intention so to do, to make openings and navigable gates in any part of the said sea-walls which shall belong to them respectively, provided that such openings and navigable gates shall be constructed under the superintendence of the engineer for the time being of the said commissioners, and in such form as he shall approve of, or, in case of disagreement between the parties desirous of making such openings or navigable gates and the said engineer of the said commissioners under the superintendence of the acting conservator for the time being of the river Mersey, and in such form as such acting conservator shall approve of."

Section 24. "And be it enacted that nothing in this act contained shall extend to prejudice or interfere with the rights, powers, and privileges of Robert Vyner, Esq., his heirs or assigns."

25. At the latter end of 1846, or early in 1847, a series of wooden stakes, each marked with a broad arrow, the ordinary Crown mark, were driven throughout the whole extent of Wallasey Pool and the creeks thereof, along the line of a tide rising 15 feet 6 inches on the old dock-sill at Liverpool, at that time considered to be the high-
*773] water mark, which bounded the Crown *right to the shore between high and low-water mark. About ninety of these stakes were driven in front of the plaintiff's land. The stakes were driven in pursuance of written instructions from the commissioners of woods and forests, dated the 14th of October, 1846, to Mr. Rendel, the engineer. No other notice was given to the plaintiff than the fact of so putting down the stakes; nor was any proceeding consequent on the instructions and report taken by the Crown, either against the plaintiff or any other frontager. The plaintiff, in January, 1847, had the position of some of these stakes marked upon a plan. The stakes remained, without objection by the plaintiff, until the month of December, 1851, when they were pulled up or cut off by the plaintiff's orders. The whole of the pieces of land now in question, Plot A. excepted, were included within the space enclosed by the stakes.

26. By another act, the 10 & 11 Vict. c. cclxiv. (Royal assent, 22d of July, 1847), intituled "An act to authorize the Birkenhead Dock Commissioners to construct an additional dock and other works at Birkenhead, in the county of Chester, and for other purposes," power was given to the commissioners to vary the line of the before-mentioned intended drain, to carry away the water theretofore flowing into Wallasey Pool at Warrington's Bridge; and they were, by s. 12, required to proceed in the carrying on and completion of the sea-wall and other works with the utmost possible despatch, and to report in writing every two months to the commissioners of woods the progress and actual state of the works. Section 56 continued the power given by the previous act to the commissioners of woods to make to the dock commissioners free grants of the Crown property in the Pool. By s. 59, the commissioners of woods were authorized, with the *consent of the lords of the treasury, to lend money to the [*774 Birkenhead Dock commissioners for the purpose of enabling them to proceed with the works. And it was enacted, by s. 61, that, if the erection of the sea-wall and other works were not prosecuted with all practicable despatch, and completed within the space of ten years to the satisfaction of the commissioners of woods, then that all the land belonging to or claimed by Her Majesty which should have been granted or used for the purpose of the works, should revert to the Crown.

27. The next act, 10 & 11 Vict. c. cclxv. (Royal assent, 22d of July, 1847), relating to the Birkenhead Docks, was passed in 1847. The material enactments contained in it, with reference to the present case, are the following:—

Section 1 extends all the unrepealed provisions of the former act to the present act.

Section 8 requires the dock commissioners to execute the sea or wharf-walls fronting the lands of any owner who may be willing to advance money for the purpose.

Section 13 requires the dock commissioners, on the application of any owner of land on the Pool, and upon being furnished by him with money, to dredge and form a channel in the Pool up to Wallasey Bridge.

Section 14 enacts that the commissioners shall, with convenient reasonable despatch, at the request of any such owner, and upon being furnished with money, dredge the bed of the Pool between the channel and line of his wall.

Section 16 empowers the commissioners to dredge the Pool as they may think fit, not exceeding a certain depth.

Section 17 authorizes the commissioners of woods to construct a portion of the walls at the expense of the Crown.

Section 18 entitles the owner of adjacent lands to *purchase [*775 the Crown rights, upon paying the expense of the walls to be built under s. 17.

Section 19 enacts that prior agreements entered into by commissioners shall not be prejudiced.

28. The next Birkenhead Dock Act was the 11 & 12 Vict. c. cxliv. (Royal assent, 14th of August, 1848), and the preamble recites that the commissioners of the Birkenhead Docks had borrowed 423,000*l.*,

which had been found insufficient to complete the works; that they had been unable to borrow any further portion of the sums they were authorized to raise; and that it was of great public importance that the works should be completed. The material enactments, so far as regards the present case, are as follows:—

Section 1 extends all the unrepealed provisions of the former acts to this act.

Section 3 incorporates certain individuals therein named, by the name of "The Trustees of the Birkenhead Docks."

Section 4 transfers all the rights and powers of the former commissioners to the new trustees.

Section 32 vests all the property in the docks and other works in the new trustees.

Section 36 authorizes the trustees to raise an additional sum of 50,000*l.* by preferential mortgages.

Section 38 directs the mode of expenditure of the money to be so raised.

29. In the year 1849, the plaintiff and the trustees of the Birkenhead Docks came to an arrangement with reference to the construction through the plaintiff's land of the new drain or culvert from Warrington's Bridge, already mentioned; and the terms of this agreement were subsequently embodied in a deed dated the 24th of July, 1849, made between the plaintiff of the one part and the said trustees of the other part.

*776] 30. By articles of agreement, dated the 25th of May, *1850, between the commissioners of Her Majesty's woods and the trustees of the Birkenhead Docks, it was agreed that the said commissioners should make, on certain terms in the said articles specified, a free grant to the said dock trustees of all the estate, right, title, and interest of Her Majesty in and over the south reserve and certain spaces of foreshore on each side of the Great Float. It was by the said agreement, provided that the same was made subject to the approval of the lords commissioners of Her Majesty's treasury, and also subject to its being ratified by parliament. The said agreement, intituled "Minutes of arrangement," was subsequently presented to parliament by Her Majesty's command, and was printed pursuant to an order of the House of Commons made on the 7th of June, 1851.

31. By another act, the 13 & 14 Vict. c. c. (Royal assent, 14th of August, 1850), intituled "An act to carry into effect arrangements made between the commissioners of Her Majesty's woods and the trustees of the Birkenhead Docks, to amend the acts relating to the said docks, and to extend the time for completion of works, and for other purposes," the said trustees were authorized to alter the course of part of the sea-wall on the north side of Wallasey Pool, and the commissioners of woods were empowered to advance the money required for the completion of a certain portion of the wall; and they were also authorized and required to construct, at the expense of the Crown, a public road over a portion of the lands to be reclaimed from the Pool. The commissioners were also authorized to make free grants of all the estate, right, title, or interest of Her Majesty, her heirs or successors, of and in the foreshore of the Pool to the trustees; and the trustees were, by s. 30, required, upon any frontager building

his wharf-wall, to convey to him the foreshore lying between his land and the line of wall.

*32. In the year 1851, the plaintiff, and the owners of the lands adjacent to the lands of the plaintiff, caused to be constructed, under the provisions of the act or acts in that behalf, a sea or wharf-wall along the frontage of their respective lands on the south side of Wallasey Pool, otherwise called "the Great Float." The plaintiff's portion of the expense of the erection of the wall was 2853*l.*, which amount was defrayed by him. [*777

33. In the same year, the plaintiff, by agreement with the Birkenhead Dock trustees, defrayed the expense of excavating a portion of the south side of the Pool or Great Float in front of his wall last mentioned, and extending a considerable distance within the Pool, the trustees not being in a pecuniary position to incur that expense. The plaintiff, being a creditor of the Birkenhead Dock trustees for the amount so expended, viz. 1388*l.*, and also for a further sum of 1000*l.* in respect of his land taken and used for the great drain under the deed of 1849, subsequently, in accordance with the provisions of an act hereinafter more particularly mentioned, passed in the year 1855, accepted, on the 15th of April, 1856, from the Birkenhead Dock trustees a bond of the corporation of Liverpool for the sum of 1552*l.*, being 13*s.* in the pound on the said two sums of 1388*l.* and 1000*l.*

34. The Birkenhead Dock trustees, notwithstanding the assistance given by the commissioners of Her Majesty's woods, found themselves unable to complete the works; and, there being no sufficient income to keep down the interest accruing on the large amount already expended, they (the trustees) became and were unable to meet their engagements; and thereupon the statute 16 & 17 Vict. c. clxv. (Royal assent, 4th of August, 1853), intituled "An Act for authorizing arrangements for the completion of the Birkenhead Docks," was passed. The preamble recites all the acts *before mentioned, that the Birkenhead Dock trustees owed 751,100*l.*, that the yearly income of the trustees was scarcely more than sufficient to pay their ordinary working and management expenses, and that under the existing circumstances the Birkenhead Dock trust was altogether insolvent, and, inasmuch as the arrears of interest on the debt of the trustees were accumulating at the rate of at least 26,000*l.* a year, the condition of the Birkenhead Docks threatened to be a condition of hopeless insolvency; and further, that it was of great public importance, as well as of great importance to the creditors of the trustees, that the Birkenhead Docks should, without further delay, be brought into use for commercial and other purposes, but that that could not be effected unless certain additional works were completed. It also recites that the dock trustees had obtained a provisional contract from contractors of the highest credit, to complete within three years, for the sum of 370,000*l.*, such of the works as were not already absolutely contracted for, on condition of that amount being satisfied as to 70,000*l.*, part thereof, by a conveyance of part of the land to be reclaimed by the execution of the works, and as to the 300,000*l.* residue thereof, by bonds, with certain preference in the said act particularly mentioned. The act contains the following among other provisions:— [*778

Section 2, unrepealed provisions in former acts continued.

Section 4 authorizes trustees to issue preferential bonds in favour of contractors, and bonds for reduced amounts, in satisfaction of the bonds previously given.

Section 13 authorizes the trustees to dredge the Pool on the north side, opposite to the sea or wharf walls, when built by the frontagers.

35. The plaintiff, together with the other land-owners, was desirous *779] that the works authorized to be *executed by the Birkenhead Dock trustees should be prosecuted and completed, and was aware of the various applications to parliament that led to the passing of the statutes already mentioned.

36. By an indenture dated the 30th of March, 1854, made between the Hon. Charles Alexander Gore, a commissioner of Her Majesty's woods, on the one part, and the trustees of the Birkenhead Docks, of the other part,—after reciting the act of 7 & 8 Vict. c. lxxix., and the agreement between the commissioners of Her Majesty's woods and the Birkenhead Dock commissioners, of the 4th day of November, 1844, already mentioned; and after further reciting the before mentioned acts of the 8 Vict. c. iv., and the 11 & 12 Vict. c. cxliv., and that the wharf-walls on the south side of the said Pool had been entirely completed, and that the walls on the north side of the Pool had also been completed from the side of the temporary dam up to the first considerable creek, as shown on the plan annexed to the said deed now in recital, but that the remainder of the walls on the north side of the said Pool had not yet been erected; and after further reciting that the said Charles Alexander Gore, as the commissioner of Her Majesty's woods in whom were then vested the powers by the said recited acts given to the commissioners of Her Majesty's woods, had, with the consent of the lords commissioners of Her Majesty's treasury, in pursuance of the said agreement in that behalf, and in exercise of the powers in the said recited acts contained, agreed to make such grant to the said trustees of the Birkenhead Docks as was and is thereinafter and hereinafter contained, without taking any money for the granting thereof,—it was witnessed, that the said Charles Alexander Gore did, as such commissioner, and with such consent, and in pursuance of the agreement therein and hereinbefore respectively *780] *mentioned, grant unto the trustees of the Birkenhead Docks all the estate, right, title, and interest of Her Majesty of and in all that portion of the bed and shores of Wallasey Pool, and the creeks and bays thereof, situate to the westward of the site of the intended dock called "The Twelve Acre Dock," coloured brown in the plan thereto annexed, and bounded thereby on the eastern side, and bounded on the western side by Warrington's Bridge, and on the northern and southern sides thereof by the lines on the said plan coloured red, and, as to the creeks and bays, where there were no red lines, by the lines coloured or tinted dark blue, and which land intended to be granted was estimated to contain 138 acres or thereabouts, and was coloured blue on the said plan.

37. By another indenture, bearing even date with and made between the same parties as the indenture and lastly hereinbefore mentioned,—after reciting the act of the 13 & 14 Vict. c. c. hereinbefore mentioned,—it was witnessed that the said Charles Alexander Gore, as such com-

missioner as aforesaid, with the consent in writing of two of the lords commissioners of Her Majesty's treasury, did grant unto the said trustees of the Birkenhead Docks all the estate, right, title, and interest of Her Majesty in all the several pieces or parcels of foreshore lying on each side of the Great Float, between the line of wall whereof the landward boundary was coloured red on the plan annexed to the said indenture, and the line thereon coloured blue, and which had already become, or would upon the completion of the wharf-walls become, reclaimed land, and which said pieces of land were more particularly delineated on the said plan, and were thereon coloured yellow. Both this and the previous grant were duly enrolled under the act 10 G. 4, c. 1., and are in the Crown Lands Office, Spring Gardens.

*38. The plaintiff did not cause the wharf-wall to be built in front of any portion of his land on the north side of the Pool or Great Float, but was ready to do so if the other frontagers had concurred; and plans and specifications for the erection of a continuous wharf-wall along the north side were prepared by the engineer of the corporation of Liverpool in the year 1857, and were approved by the plaintiff. [*781

39. The trustees of the Birkenhead Docks, upon the execution of the before-mentioned Crown grants to them of the bed and foreshores of Wallasey Pool, made every exertion in their power to raise the additional funds required to carry out the intention of the legislature as expressed in the last-mentioned act; but they entirely failed to obtain an additional loan; and they became and were wholly unable to pay or discharge any portion of the debt owing by them, including the before-mentioned debts owing to the plaintiff; and the contractors also refused to proceed with the works upon the security mentioned in the said act, whereby the completion of the Great Float by the trustees became and was entirely impracticable. At this juncture, the corporation of Liverpool agreed to purchase the property of the Birkenhead Dock trustees and the Birkenhead Dock Company; and by articles of agreement made the 16th of May, 1855, between the trustees of the Birkenhead Docks of the first part, the Birkenhead Dock Company of the second part, and the mayor, aldermen, and burgesses of the borough of Liverpool on the third part,—after reciting, among other things, that the Birkenhead Docks were incomplete, and that the income derived therefrom was little more than sufficient to defray the working expenses, and that the works were then at a stand, and that a committee of the House of Commons had intimated they entertained an opinion that it would be *advantageous to the maritime trade of the port of Liverpool, and of public advantage, that the whole dock system on both sides of the river Mersey, should be put under the management of one public trust; and further reciting, that, in consequence of that intimation, and with a view to that object, the parties thereto had determined to enter into the said articles by way of agreement, as thereinafter appearing,—it was witnessed that the parties thereto thereby mutually agreed, inter alia, as follows:— [*782

1st. "That the agreement should be subject to the approval of parliament."

2dly. "That all the docks, lands, and buildings of the trustees, and all the works, lands, and buildings of the company, discharged from,

inter alia, the bond, judgment, and other existing debts of the trustees, and from the mortgages and other debts of the company, should be transferred to the corporation."

3dly. "That, within one month from the passing of the act authorizing such transfer, the corporation should deliver to the said trustees bonds under the corporate seal for the aggregate amount of 391,463*l.*"

4thly. "That, within the same period, the corporation should deliver to the company bonds under the corporate seal for the aggregate amount of 751,537*l.*"

15thly. "That the said agreement should, on or before the 19th of May, 1855, be submitted for their consent and approval to (among other parties) the bond-holders and general creditors of the trustees."

40. On the 5th of May, 1855, being subsequent to the arrangement of terms between the trustees of the Birkenhead Docks and the corporation of Liverpool, but a few days before the agreement last mentioned was actually executed, a letter was written and sent to the plaintiff by Mr. Bramah, the law clerk of the trustees, informing him, the plaintiff, that a conditional *arrangement had been made with the corporation of Liverpool for a transfer to them of the Birkenhead Docks, in consideration of a sum which would enable the trustees to pay the Birkenhead Dock creditors 13*s.* in the pound, and requesting to know whether the plaintiff would consent to that arrangement. In reply to this letter, Mr. Bicknell, the plaintiff's solicitor, by a letter to Mr. Bramah, dated the 10th of May, 1855, written with the plaintiff's authority, assented to the arrangement.

*783]

41. By another act of 18 & 19 Vict. c. clxxi. (Royal assent, 23d of July, 1855), intituled "An Act for vesting the undertakings of the Birkenhead Dock Company and of the Trustees of the Birkenhead Docks in the Mayor, Aldermen, and Burgesses of the Borough of Liverpool," and for other purposes,—after reciting the various acts already mentioned, and the said agreement of the 16th of May, 1855, and further reciting that the completion of the docks at Birkenhead would be advantageous to the maritime trade of the port of Liverpool and to the public,—it was enacted as follows:—

Section 2. "The expression 'undertaking' by this act transferred to the corporation, or other words in this referring thereto, shall mean the estate, rights, and powers of the trustees and company respectively by this act transferred to the corporation; and the words 'agreement for transfer' shall mean the agreement set out in the schedule to this act."

Section 4. "The recited agreement for transfer is by this act confirmed, and may and shall be carried into effect accordingly, subject nevertheless to the provisions of this act, so far as such agreement is inconsistent with the same."

Section 7. "Subject to the provisions of this act, all the docks, lands, and buildings of or to which the trustees were immediately before the commencement *of this act, by virtue of the trustees' acts or any of them, or otherwise however, seised, possessed, or entitled, either at law or in equity, and the caisson belonging to those docks, are by this act transferred to and shall be vested absolutely in the corporation, but nevertheless upon the several trusts and conditions and to and for the several uses and purposes upon, to, and for

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which the trustees were heretofore seised or possessed or entitled to the same respectively, and subject to the several liabilities created by act of parliament, and also subject and without prejudice to the several leases and agreements for leases specified in the first schedule to the agreement for transfer, so far as such leases and agreements respectively are valid.

Section 9. "Provided always that the transfer and vesting of the property of the trustees and of the company respectively shall not take effect until the delivery by the corporation to the trustees and the company respectively of the bonds of the corporation to be as by this act provided delivered to them respectively."

Section 16. "From and after the commencement of this act, the docks, lands, buildings, and caisson of the trustees, and the undertaking of the company, by this act respectively transferred to and vested in the corporation, shall be one undertaking, and all the powers, privileges, and authorities of the corporation under this act shall accordingly extend and apply to that one undertaking, and to the corporation and all other persons respectively with respect to the same."

"Section 27. If at any time hereafter the trustees of the Liverpool Docks shall be authorized by parliament to become the purchasers of the undertaking by this act vested in the corporation, then, upon being repaid or adequately secured the repayment of all sums expended by them in the purchase or completion of the *said undertaking [*785 or in relation thereto, or for the payment of which they shall have become liable, and being paid or relieved from all liability, expense, or loss incurred by them for the purposes of the said undertaking, or incident thereto, with interest thereon, or on such other terms as may be mutually agreed upon and approved by parliament, the corporation shall, and they are hereby required to, transfer the said undertaking, as conferred upon the corporation by this act, to the said trustees of the Liverpool Docks, together with all their powers, rights, privileges, and authorities in relation to the said undertaking, to the end that the same and the future control and management thereof may thereafter be vested in the said trustees of the Liverpool Docks, as part of the dock estate of Liverpool."

Section 43. "The application by the trustees as by this act provided, of the bonds delivered to them by the corporation, shall be full satisfaction and discharge of all the rights, interests, claims, and demands whatsoever of the several creditors of the trustees, whether bond-holders, judgment-creditors, or creditors by specialty or simple contract, or otherwise, and of all other claimants against the trustees; and all such rights, interests, claims, and demands shall thereupon absolutely cease."

42. It was proved before the referee, on behalf of the plaintiff, with the view of fixing the trustees of the Birkenhead Docks and the corporation of Liverpool with notice of the existence of the Crown grant to the plaintiff, dated the 17th of December, 1830, that, in the years 1849 and 1850, several letters passed between Mr. Davies, the land-agent of the plaintiff, and Mr. Rendel, the engineer of the trustees, who was also employed by the plaintiff in and about the construction of the entrance dam in front of his property. The alleged notice to

*786] the trustees is contained in the *following passage in the letter dated the 9th of June, 1849, and again at the conclusion of the letter of the 25th of February, 1850:—"You are, I believe, aware that Mr. Vyner purchased all the Crown rights in front of his land some years ago." The alleged notice to the corporation of Liverpool is contained in two letters, dated respectively the 15th of April, 1857, and the 23d of September, 1857, from Mr. Davies to Mr. John Hartley, the engineer of the corporation. The passages relied on are in the words following:—"This would lessen the excavations and shorten the wall; and, as Mr. Vyner has purchased all Crown rights, there could be no Crown question raised." The passage in the second letter is—"And, as the land beyond Mr. Mainwaring's is Mr. Vyner's on both sides, there is no one to find fault. Mr. Vyner purchased the Crown rights in front of his land in 1829." Unless these letters, or anything before stated in this case, amounted in law to notice to the trustees of the Birkenhead Docks and to the corporation of Liverpool respectively of the plaintiff's Crown grant of the 30th of December, 1830, the trustees of the Birkenhead Docks had no notice of the said grant prior to the sale and transfer of the Birkenhead Dock estate to the corporation of Liverpool, and the corporation of Liverpool had not, until the proceedings in committee of the House of Commons, in 1858, hereinafter mentioned, any notice or knowledge of the existence of the before-mentioned Crown grant to the plaintiff of the 17th of December, 1830, or of any right or claim on the part of the plaintiff to a portion of the land included in the two several Crown grants to the trustees of 30th of March, 1854. And, although aware, as before stated, of the agreement for a grant dated the 4th of November, 1844, the plaintiff had not any knowledge or notice of the making of the two last-mentioned grants until the proceedings in *787] committee of the *House of Commons in 1858, when he first had notice of the grant of the bed of the Pool, and until the Cheshire Spring Assizes, in 1861, when he first had notice of the grant of the foreshores. The two last-mentioned grants were produced to the town-clerk of Liverpool, in the course of the negotiation for the sale and transfer to the corporation of Liverpool of the property of the Birkenhead Dock trustees and the Birkenhead Dock Company which resulted in the act of 1855; and it was distinctly understood on the part of the corporation that they were purchasing all the property included in those grants. The bonds for the before-mentioned sums of 391,463*l.* and 751,537*l.* were duly delivered by the corporation to the Birkenhead Dock trustees and the Birkenhead Dock Company respectively, pursuant to the terms of the said agreement and act of parliament; and the plaintiff accepted and received from the trustees one of those bonds in satisfaction and discharge of the hereinbefore-mentioned debts due to him by the Birkenhead Dock trustees.

43. By articles of agreement, dated the 1st of November, 1856, and made between the corporation of Liverpool of the one part, and the plaintiff of the other part, after reciting, that, under and by virtue of the several acts of parliament relating to the Birkenhead Docks, the corporation were authorized to deepen Wallasey Pool, for the purpose of making the same into a floating dock, and that the corporation had

contracted for the deepening thereof,—it was witnessed, that, in consideration of the corporation agreeing to construct a double line of railway to the lands of the plaintiff, so as to connect the same with a certain line of railway already constructed, the plaintiff agreed that the corporation should be at liberty to deposit upon certain adjacent land of the plaintiff the soil excavated from *the Pool. The [*788 contractors for the work excavated a large quantity of earth and spoil from the portion of the bed of the Pool east of Wallasey Bridge now claimed by the plaintiff in this action, without any objection on his part, and also a large quantity of earth and spoil from the remainder of the Pool to the east of the lands now in question, all which earth and spoil they deposited on the plaintiff's land under the said agreement.

44. By another act, the 20 & 21 Vict. c. clxii. (Royal assent 25th of August, 1857), entitled "An act for consolidating the docks at Liverpool and Birkenhead into one estate, and for vesting the control and management of them in one public trust, and for other purposes," —after reciting, among other things, all the before-mentioned acts, and further reciting that all the property of the trustees of the Birkenhead Docks and of the Birkenhead Dock Company, and their powers in relation thereto, were vested in the corporation of Liverpool, who had expended further considerable sums in reference thereto,—it was enacted by sections 26, 37, 39, 50, 51, 52, and 60, as follows:—

Section 26. "All such estate and interest in the docks, buildings, and other property, both real and personal, situate at Birkenhead or elsewhere, as are transferred or intended to be transferred to the corporation of Liverpool by the Birkenhead Docks Act, 1855, shall, upon and after the first day of January, 1858, vest in the board, but subject to all charges and liabilities affecting the same."

Section 37. "The board shall pay to the corporation, on or before the several days mentioned in the fourth part of the schedule hereto, the several sums specified in such schedule; and the corporation shall apply the several sums received by them under this enactment in payment of the several sums owing or to become due as specified in the said schedule."

*Section 39 enacts that the board shall repay to the corpora- [*789 tion all moneys expended in the payment of interest on the bonds given as the consideration for the Birkenhead Docks, or in respect of works executed by the corporation under the "Birkenhead Docks Act, 1855."

Section 50. "From and after the 1st day of January, 1858, all docks and works belonging to the board, and all docks and works that may hereafter belong to the board, shall be deemed to constitute one estate only, hereinafter called 'the Mersey Dock estate;' and a uniform system of management shall be adopted with respect to the whole of such Mersey Dock estate."

Section 51. "The board shall, immediately after the commencement of this act, proceed with the construction of the outer works at Birkenhead referred to in 'The Birkenhead Docks Act, 1853,' with a view to the completion of the same substantially in accordance with the plans that have been sanctioned by parliament."

Section 52. "Until the board shall take possession of the Birken-

head Docks under the provisions of this act, the corporation shall proceed with the construction of the works authorized by the Birkenhead Dock Acts; and, after the board shall have entered into possession of the said Birkenhead Docks, they shall assume all contracts and all liabilities of the said corporation in respect of the said works."

Section 60. "The board shall, in the ensuing session, prosecute a bill in parliament for consolidating the several acts specified in the schedule hereto, and for obtaining any additional powers that may be necessary or expedient for carrying into effect the purposes of this act, and for revising and regulating the rates and charges to be levied upon all vessels, goods, merchandise, and other articles now liable or hereafter liable to the same."

*790] *45. The consideration for the transfer of the Birkenhead Docks by and from the corporation to the Mersey Docks and Harbour Board, the now defendants, was, under section 37, 1,337,670*l.*; and under section 39, 134,122*l.* 4*s.* 10*d.*, making together 1,471,792*l.* 4*s.* 10*d.*; and besides these sums the legislature imposed upon the defendants the duty of completing the works, the cost of which will increase the total amount paid to upwards of 4,000,000*l.*

46. Under and by virtue of an order of the enclosure commissioners for England and Wales, made pursuant to the acts for the enclosure, exchange, and improvement of land, and dated the 22d of July, 1858, after due notice by advertisement in three successive weeks of the exchange having been given, as required by the said acts, the plaintiff exchanged the plots Nos. 7 and 8 in the Crown grant of the 17th of December, 1830, with the trustees of Richard Smith, Esq., deceased, for other lands in the said township of Poolton-cum-Seacombe. These plots are situated at a distance of about half a mile from any of the other lands comprised in the Crown grant of 1830 to the plaintiff, and are shown upon the large plan No. 3, and are therein numbered 7 and 8.

47. The now defendants, in obedience to the direction of the legislature, contained in s. 60 of the act last mentioned, prosecuted in the then next session of parliament a bill to consolidate the provisions of the various dock acts: and they also, in the same session, prosecuted another bill to enable them to construct certain works at Birkenhead in substitution for and in addition to those already authorized.

48. It was necessary, with reference to the latter of these bills, that a plan and book of reference should be previously deposited with the clerk of the peace for the county of Chester; and, with the view *791] of *preparing them, the agents of the defendants had, in the month of October, 1857, an interview with the plaintiff's agent, who then pointed out some of the boundaries of the lands of the plaintiff and of the adjacent properties. On that occasion the plaintiff's agent stated that the projecting plot of land marked A, on the plan No. 1, was the plaintiff's property; and that information was acted upon in preparing the deposited plan and book of reference; and no claim was then set up by the plaintiff's agent to the bed of the Pool, nor was any question asked about it.

49. The usual notice of the intention to apply for the act was afterwards served by the defendants' solicitor upon the plaintiff, which notice contained the following passage:—"If there should be any

error or misdescription in the annexed schedule, I shall feel obliged by your informing me thereof at your earliest convenience, that I may correct the same without delay." In the schedule annexed to the notice, the "owners or reputed owners" of plot C. in question in this cause, are stated to be, the plaintiff, and the mayor, aldermen, and burgesses of Liverpool, and Daniel Campbell; but, save as above mentioned, and, except as to plot A., the plaintiff was not in the said schedule stated to be the owner or reputed owner of any of the plots in question in this action. The plaintiff replied to the notice by giving the usual printed assent to the bill, and did not intimate or give notice that there was any omission or inaccuracy in the schedule. Similar notices were given on the same occasion to all the frontagers on Wallasey Pool who had creeks or inlets running into their land, on the ground that they generally claimed to be entitled to the soil of those creeks or inlets, although such claim was disputed by the defendants, and also because the frontagers, including the plaintiff, were respectively *contingently entitled to the land which would be reclaimed by the sea walls if and when built by them respectively [*792 in front of their land.

50. The plaintiff, upon the introduction of the two last-mentioned bills into the House of Commons, presented petitions against them; and he was heard by counsel before the committee to whom the bills were referred. There is no allusion, in either of these petitions, to the Crown grant of the 17th of December, 1830; but the plaintiff's counsel, in his adress to the said committee, stated and referred to the plaintiff's grant from the Crown, and produced a plan to the committee, in which all the lands now in dispute are stated to belong to the plaintiff. The plaintiff's opposition was mainly directed against the power which the defendants sought to obtain of taking the like rates upon goods brought by vessels using the Birkenhead Docks, including the Great Float, which they the defendants already had in respect of goods brought into the docks at Liverpool. The plaintiff in his petition also complained of the great injury he alleged he had sustained by reason of the non-completion of the Great Float under the acts then in force. Each of the bills contained an interpretation clause, by which it was provided that the word "docks" should include the Great Float, and that the expression, "The Great Float" should mean that part of Wallasey Pool which lies between Warrington's Bridge and the west side of the permanent embankment across the same, situate at the eastern extremity thereof.

51. The bills passed the House of Commons notwithstanding the plaintiff's opposition; and, upon their reaching the House of Lords, the plaintiff renewed his opposition, and in his petition presented to that House of Parliament, the plaintiff gave notice of *the Crown grant of the 17th of December, 1830, in the following [*793 terms:—"That, in particular, in the year 1830, your petitioner purchased from the commissioners of Her Majesty's woods and forests the rights of the Crown in a large tract of land forming parts of Wallasey Pool, between high and low-water mark, part of which lands so purchased now constitute part of the site of the Great Float, being that part of the same float lying between your petitioner's lands on the north

side, and your petitioner's lands on the south side of the same float at Poolton Bridge."

52. The plaintiff was heard before the committee of the House of Lords by his counsel in opposition to the bills, which opposition was, as in the House of Commons, directed against the power the defendants sought, to levy dock-rates upon goods on board ships using the Great Float. The committee, after hearing both sides, directed that a special provision hereinafter set forth, in favour of the plaintiff and another landowner, should be introduced into the bill relating to the new works; and both bills were passed, and subsequently received the Royal assent. These acts are the 21 & 22 Vict. c. xc., and the 21 & 22 Vict. c. xcii., and their short titles respectively are "The Mersey Docks and Harbour (Works) Act, 1858," and "The Mersey Dock Acts Consolidation Act, 1858." The special provision above alluded to is contained in s. 15 of the first-mentioned act, and is in the terms following:—"And whereas Sir Joseph Bailey, Bart., and Robert Vyner, Esq., are or claim to be owners of lands abutting on the south and west sides of the Great Float, but which lands are not at present proposed to be purchased by the board, but it is just and expedient that the owners of the said lands should be enabled, if they think fit, to require the said board to purchase and take so much of the said lands
*794] including the wharf-walls (if any) *in front thereof, as shall be equal in width to the quantity of land which they propose to purchase on the north side of the said float. Therefore, if the said Sir Joseph Bailey and Robert Vyner respectively, or the owners for the time being of the said lands on the said south and west sides, within twelve months from the passing of this act so require by notice in writing served on the board, the said board shall and they are hereby required to purchase such lands and walls, and to compensate the owners thereof and other parties interested therein, in the same manner and on the same principle of compensation in all respects as provided by this act with reference to the purchase of lands on the north side of the said float."

53. Upon the passing of the acts last mentioned, the defendants, being desirous to proceed with the works without waiting for the assessments of the compensation payable to the various frontagers, entered into negotiations with them for the purpose of obtaining their consent to enter at once upon the lands, for the purpose of constructing the works; and, on the 21st of August, 1858, the defendants' attorney wrote and sent to Mr. John Davies, the plaintiff's agent, a letter in the words following:—

"Mersey Docks and Harbour Board,
'Solicitor's Department, Liverpool, 21st August, 1858.

"Dear Sir,—With the exception of Messrs. Pollard, to whose solicitor I am now writing, we have practically the assent of all the other frontagers on Wallasey Pool to our going on with the building of the wall, without prejudice (to either party) to any question as to value or otherwise which can arise before arbitrators or juries, and are proceeding with that work as expeditiously as possible. We trust that Mr. Vyner will favour us with his assent also on the same terms.

"JOHN NORTH."

*To this letter the said Mr. Davies, on the 25th of August, 1858, wrote and sent to the defendants' attorney the following reply:— [*795

"Dear Sir,—Mr. Vyner will not object to your going on with the building of the wall on Wallasey Pool, without prejudice (to either party) to any question as to value or otherwise which can arise before arbitrators or juries. "JOHN DAVIES."

54. Subsequently to and shortly after the 25th of August, 1858, the defendants proceeded to execute the works now existing, and completed the excavation of the Great Float, and the construction of the dock-wall, where incomplete, on the north side of the Pool, and built the dock-walls running round the south side of plots A. and B.

55. On the 4th of September, 1858, the defendants served the plaintiff with a notice to treat, having a plan annexed thereto. This notice the plaintiff answered by a notice of claim dated the 24th of September, 1858. On the 11th of November, 1858, the defendants served the plaintiff with a further notice to treat, which the plaintiff answered on the 2d December, 1858, with a further notice of claim.

56. Subsequently to the 25th of August, 1858, a correspondence passed between the plaintiff's and defendants' attorneys. The letters of the plaintiff's attorneys in this correspondence contain the only objections which were made by or on behalf of the plaintiff with reference to the works executed by the defendants after the 25th of August, 1858.

57. It was proved, that, immediately upon the completion of the great drain already alluded to, the Birkenhead Dock commissioners formed an enbankment across the water immediately above, that is, to *the west of, and close to, Warrington's Bridge. This work was done with the plaintiff's acquiescence. The embankment [*796 was completed in the year 1849; and from that time all water above was excluded from the Great Float. In the year 1850, the said Birkenhead Dock commissioners completed two other embankments across the Great Float, one called the Duke Street embankment, opposite to the street of that name shown upon plan No. 3, and the other called the temporary Seacombe embankment, just above the permanent embankment shown upon the same plan. The temporary Seacombe embankment, remained until the completion of the permanent embankment in the year 1860. Upon the completion of the Duke Street embankment and the temporary Seacombe embankment, the water between them was run off, and walls were begun under the provisions of the Walling Acts, or some or one of them, by the commissioners and by various frontagers on the south side, and as to a small portion by two of the frontagers on the north side at the east end; and a deep channel capable of taking up the heaviest ships was cut by the said commissioners on the south side of the Float, up to the Duke Street embankment. Another earthen embankment was then thrown by the said commissioners, under the provisions of the same act, across the Float immediately above, that is, to the west of, Wallasey Bridge; and the water between the last-mentioned embankment and the Duke Street embankment was run off, and the walling on the south side was continued, and the deep channel was extended alongside those walls up to Wallasey Bridge,—the excavation of this

channel, so far as it extended alongside the plaintiff's wall, being the excavation referred to in paragraph 33 of this case. Upon the completion of the deep channel or cutting and of the south wall up to
*797] Wallasey Bridge, the *water was re-admitted to the upper part of the float, and a passage was cut through the Duke Street embankment on the south side, in order to make the deep channel continuous. The re-admission of the water took place in the year 1852. About the end of 1852 or the beginning of the year 1853, another embankment was placed across the Great Float at its extreme eastern limit, near the river Mersey, save that the entrance to the Morpeth and Egerton Docks was left clear. In 1856, the Duke Street embankment was restored, the small embankment near Warrington's Bridge was cut through with the plaintiff's acquiescence, the upper part of the Pool or Float was again run dry; and in 1856, 1857, and 1858 the bed of the Pool up to Wallasey Bridge was, under the provisions of the said acts, excavated to a uniform depth of nine feet below the old dock-sill of Liverpool; the eastern part of the Float was also excavated to the same depth, and the north walls were completed under the Mersey Docks and Harbour (Works) Act, 1858, as shown upon the same plan, No. 3. The above acts, so far as they are not stated to have been done by the said commissioners, were done by the Birkenhead Dock trustees, or by the corporation of Liverpool, or by the defendants, as respectively successors in title to the said commissioners.

58. In the year 1860, when the construction of the graving-docks shown upon plan No. 3 was in contemplation, an application was made by Mr. Hartley, who was then the engineer of the defendants for the purposes of their works, to Mr. Davies, the plaintiff's agent, for license to deposit the excavations from the intended site of the graving-docks upon land of the plaintiff's on Bidston marsh. A plan was sent by Mr. Davies to Mr. Hartley, showing an area proposed by him
*798] to be used for such deposit, of 16½ acres of *land; of these 16½ acres, about 12½ are the undisputed property of the plaintiff, and the remaining four acres are a part of the lands now in question in this action. A correspondence passed between the said Mr. Davies, Mr. Mason, the secretary of the defendants, and Mr. Hartley and his assistants, on the subject. After this correspondence, and in pursuance of the arrangement so made between Mr. Davies and Mr. Hartley, the excavations from the said graving-docks were deposited on the said 16½ acres of land, and thereby the bed of the Pool was to the extent of about four acres filled up and made into land as shown on the plan No. 3. But it was proved before the referee, on behalf of the defendants, that, at the time of the arrangement so made between Mr. Davies and Mr. Hartley, the latter was not aware of the existence of any question between the plaintiff and the defendants as to the title to any part of the area so proposed to be used and used accordingly; and, although the letter of Mr. Davies to Mr. Hartley, dated the 12th of June, 1860, was submitted to the works committee of the Mersey Board, at a meeting held on the 30th of the same month, at which meeting Mr. Hartley was present, it did not appear that the tracing referred to in the letter was produced to them, the only question brought under their consideration being whether they would

authorize the making, at the plaintiff's expense, of an opening from the Great Float into Bidston Marsh, which question they resolved in the negative; nor was there any evidence that on that or any other occasion anything passed before the works committee or the board with regard to the proposed filling up of a part of the Great Float. It was also proved that Mr. Hartley had, in his capacity of engineer, general authority to select an appropriate site for the deposit of the excavations from the graving-docks, and to arrange the amount to *be paid for the use of land for that purpose; but that it was not within the scope of his authority to interfere with matters [*799 or questions appertaining to the defendants' title to land, and that all such matters were within the province of the solicitor exclusively; and it was also proved that the solicitor never authorized or sanctioned the deposit within the bed of the Great Float of any portion of the excavations from the graving-docks, and that, although the solicitor was aware generally that some arrangement had been come to between the engineer and the plaintiff for the deposit thereof upon Bidston Marsh, he was not aware, nor, so far as he knew, were the defendants aware, until after the filling up had been done, either that such work was in progress, or of the existence of any agreement by the engineer, or of any intention on his part, to deposit any portion of the excavations within the bed of the Great Float.

59. In the year 1860, the plaintiff, without objection on the part of the defendants, excavated the navigable channel referred to in a letter of Mr. Davies to Mr. Hartley of the 12th day of June, 1860, and shown upon plan No. 2, therein described as "Navigable Channel of 1860," for which purpose he cut through the embankment above or to the west of Wallasey Bridge, and made up the embankment at Warrington's Bridge.

60. The defendants admitted before the referee, for the purposes of the present action, that, on the 25th of August, 1858 (being the date of the letter from the plaintiff's agent to the defendants' attorney set forth in paragraph 53 of this case), plot A. was vested in the plaintiff in fee-simple; but it was contended that the defendants were empowered, and he found that they were empowered by the Mersey Docks and Harbour (Works) Act, 1858, to take the said plot A. *compulsorily for the purposes of the works authorized by the said act. [*800

61. It was proved that the plaintiff's estate, mentioned in paragraph 1 of this case, had been immensely increased in value by the construction of the Great Float and works.

62. In considering the questions of law which might be raised on this case, the court was to have power to draw all inferences of fact which a jury might draw.

63. It was agreed before the referee, between the counsel for the respective parties, that he should not set out upon the case the questions of law intended to be raised, but that the parties should interchange statements of the points of law to be raised by them respectively upon the facts as stated in the case.

Judgment was to be entered for the plaintiff, either for the whole or for such part of the premises, or for the defendants, as the court should direct.

The points for the decision of the court, stated on the part of the plaintiff, pursuant to paragraph 63 of the special case, were as follows:—

"1. That the plaintiff was, on the 19th of February, 1861 (the date of the writ in this ejectment), and still is, entitled to the possession of all the lands in question in this cause, as part of his ancient freehold estate in the parishes of Wallasey and Bidston, or as allotment made to him in respect of parts of such estate, by virtue of his exclusive possession thereof from about the year 1814:

"2. That he was on the said 19th of February, 1861, and still is, entitled to the possession of all the lands in question in this cause, which are situate within the manor boundaries of Bidston, as found by the special case, as lord of that manor:

"3. That he was on the said 19th of February, 1861, and still is, entitled to the possession of all the lands in question in this cause, as
*801] having been *expressly included in his Crown grant dated the 17th of December, 1830:

"4. That nothing is stated in or is reasonably to be inferred from the special case, to divest or defeat his title derived as before stated, or to prevent his sustaining an ejectment in respect of any part of the land in question in this cause:

"5. That the Crown grant to the defendants stated and referred to in paragraph 36 of the special case was and is wholly unauthorized and void in itself (without reference to any prior title in the plaintiff, or prior grant made to the plaintiff), so far as respects all lands comprised in that grant lying to the west or north-west of Wallasey Bridge:

"6. That the Crown grants to the defendants stated and referred to in paragraphs 36 and 37 of the special case were and are wholly unauthorized and void as against the plaintiff:

"7. That the line of a medium tide, which bounds the Crown rights to the foreshores between high and low-water mark, is erroneously described and laid down in and by both the grants made to the defendants stated in paragraphs 36 and 37 of the special case, and that those grants were and are, as to all land lying above the line of the true medium tide line, inoperative and void on that account:

"8. That, upon the facts set forth in the special case, the defendants cannot lawfully set up or maintain any defence to this ejectment, under the provisions of the 124th section of the Lands Clauses Consolidation Act, 1845."

The points stated on the defendants' part were as follows:—

"1. That the legal estate in fee-simple in all the plots of land in
*802] question (plot A. excepted) is vested *in the defendants, inasmuch as those several plots having been, and at the passing of the Birkenhead Docks Act, 1855, being, in the actual possession of the trustees of the Birkenhead Docks as of their own property, were by that act vested in the corporation of Liverpool, and were subsequently, by the Mersey Docks and Harbour Act, 1857, transferred to and vested in the defendants:

"2. That the trustees of the Birkenhead Docks immediately before and at the passing of the said act of 1855 had an equitable right to retain possession of all the lands now claimed (plot A. excepted), and

that the act of 1855 converted that equitable right or estate into an absolute estate in fee-simple in the corporation of Liverpool, which estate was subsequently transferred to the defendants:

"3. That, upon the facts stated in the case, the legal presumption is, that the bed of the Pool between high and low-water mark was at the date of the grant from the Crown to the plaintiff the property of the Crown, and that, as respects the grant, it is ambiguous in its terms, and the acts of the plaintiff thereunder, coupled with his assent to the passing of the act of 1844, amounted to a license to the Crown to grant to the commissioners of the Birkenhead Docks the whole bed of Wallasey Pool, including the portion thereof now in dispute:

"4. That the various acts of parliament passed in relation to the system of docks on the shores of the river Mersey involve, and indeed relate exclusively to, important public rights and interests, and are therefore to be looked upon as of a public and not of a private nature; and that the jurisdiction over Wallasey Pool conferred upon the defendants and their predecessors in title by the several acts of parliament mentioned in the special case, overrides and extinguishes *all private rights to exclusive possession of land within the limits of such jurisdiction: [*803

"5. That, assuming the fee in the several plots of land in question to be vested in the plaintiff, he is, at the utmost, only to be compensated in accordance with the provisions of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and has no right to recover the actual possession of the lands, inasmuch as the defendants and their predecessors in title respectively originally took possession of the various plots with and under the plaintiff's license and consent, for the purposes of the works authorized by the several acts of parliament mentioned in the special case."

Welsby, for the plaintiff.—The substantial questions for the consideration of the court upon this special case are these:—Mr. Vyner, the plaintiff, claims to be the owner in fee of certain of the lands which the defendants, the Mersey Docks and Harbour Board, have taken for the purpose of their works. The plaintiff's claim is founded,—first, upon length of possession,—secondly, upon his rights as lord of the manor of Bidston,—thirdly, under a grant from the Crown made to him in the year 1830. The defendants claim under a subsequent grant from the Crown of the same lands, obviously made in entire oblivion of the former grant. [ERLE, C. J.—The real question between the parties is, whether the defendants have acquired title against the admitted title of the plaintiff, either under the several acts of parliament referred to in the case, or by the grant from the Crown in 1854, or by any acquiescence of the plaintiff, or by means of all combined. *Sir Fitzroy Kelly*, Q. C.—The contention on the part of the defendants will be, that the property in the lands in question passed to them under the 18 & 19 Vict. c. clxxi. and that at all events they have acquired the *right permanently to keep possession of them. ERLE, C. J.—Then the question will be, whether the defendants have acquired a right, from the acts of the plaintiff, or the grant of the Crown, or under the acts of parliament, to keep the plaintiff out of possession of the land, without prejudice to his claim for compensation in respect of plot C.] It is submitted that nothing is shown on [*804

the face of the case to displace the plaintiff's title, or to entitle the defendants to hold the land as against him. The grant to the defendants (or their predecessors) in 1854, was wholly unauthorized and void: by reason of the previous valid grant to the plaintiff, that grant has no operation: and the defendants acquired no title either under the acts of parliament or by reason of any supposed acquiescence on the part of the plaintiff. The indenture of March the 30th, 1854, set out in paragraph 36, purports to be a "free grant," and therefore could only be made under some or one of the acts of parliament therein recited. The works authorized by the 125th section of the 7 & 8 Vict. c. lxxix. have nothing whatever to do with the lands claimed in this ejectment: the only power the commissioners had, was to construct an embankment across the Pool, "for the purpose of penning back the tidal and other waters of the said Pool between the western side of the said intended embankment across the same and the bridge known as Warrington's Bridge." The 55th section recites that Her Majesty, in right of her Crown, is, or claims to be, entitled to the fundus or soil between high and low-water mark of Wallasey Pool and of the Cheshire shore of the river Mersey adjoining the eastern limits of the said Pool; and that it is expedient that the commissioners of woods, &c., shall be empowered to grant *all the estate, right, title, and interest of Her Majesty*, her heirs and successors, of and in *so much*
*805] *of the said fundus or soil *of the said Pool and river as will be required for the purposes of this act*, or for any purpose consequent on the passing of this act;" and it empowers the commissioners of woods for the time being "to give and grant to the commissioners for executing that act all the estate, right, title, and interest of Her Majesty, her heirs and successors, of and in so much and such parts of the soil and shore of the said Pool and river as they shall deem it expedient to give or grant to the said commissioners, without taking any consideration in money for the giving or granting thereof." The lands upon which the commissioners are authorized to construct works, are defined in schedule C., and do not include the lands in question. It is submitted that neither the agreement of 1844 nor the conveyance of 1854 was warranted by the 7 & 8 Vict. c. lxxix. or any of the subsequent acts of parliament; and that none of the acts done by the plaintiff, as detailed in the special case, amount to an acquiescence by him in any title being gained by the defendants, or disable him from asserting the undoubted title vested in him by the grant from the Crown in December, 1830.

Sir Fitzroy Kelly, Q. C. for the defendants.—The real question in issue between these parties, is, whether the plaintiff has not by his acquiescence in the various acts of parliament referred to in the case, and in the works constructed by the defendants under the authority of those acts, transferred to the defendants a permanent right to exclude him from the possession of the land in question,—the exclusive possession being absolutely essential to the carrying out by the defendants of the important public works which parliament has thought fit to intrust to their management, and upon which they have already expended upwards of a million of money. The 55th section
*806] of the 7 & 8 Vict. c. lxxix. *assumes that the fundus or soil of Wallasey Pool was in the Crown. [ERLE, C. J.—Although it

was assumed that the soil was in the Crown, and that it was intended that the commissioners of woods should be empowered to grant it to the commissioners for carrying the act into effect, and the Crown by its officers professed to grant, still, if the Crown had already granted the same land to another, the subsequent grant operated nothing.] It is clear that the docks and the Great Float were to be constructed, in whomsoever might be the ownership of the soil. The 55th section is perfectly conclusive. The Crown was to have power to grant so much of the soil of the Pool as it should deem expedient and necessary for the purpose of the works contemplated by the act; and the Crown deemed it expedient to grant the entire soil from the river Mersey to Warrington's Bridge. The great question, however, in the cause, is, whether, by reason of the several acts of parliament, and of the grant of the Crown in 1854, and of the acts of the plaintiff showing him to have been an assenting party to those acts of parliament, the plaintiff has not virtually entered into a contract with the trustees whereby he has dispossessed himself of his possessory right to all that was necessary to enable them to carry on this great undertaking. This precise question has never been raised before in a court of justice. Questions somewhat analogous have arisen in the case of railway and other companies established for their own profit. This is the case of a public body acting gratuitously in the execution of a public work. With full notice of all that is being done and is proposed to be done, the plaintiff is an assenting party to these several acts of parliament, and in fact takes a benefit under them: and, under the act of 1855 (18 & 19 Vict. c. clxxi.), by which the undertaking was transferred from the Birkenhead Dock Trustees *to the corporation of Liverpool, the purchasers became purchasers without notice of this [*807 encumbrance on the property. That act clearly takes the title out of the plaintiff, if he had any. This argument is fortified by the cases of The Duke of Beaufort *v.* Patrick, 17 Beavan 60, and Mold *v.* Wheatcroft, 27 Beavan 510. The former of these cases was as follows:—In 1794, an act (34 G. 3, c. cix.) authorized the making of a public canal through lands of which A. was the owner and B. his lessee, and, upon payment of the compensation, the land was to vest in the company. An arrangement was made in respect of compensation with B., but not with A. The canal was made "with the full consent and approbation of and in accordance with the wishes of A.," whose name was mentioned in the act, and it was enjoyed until the expiration of the lease in 1844. The representatives of A. then recovered at law the land taken for the canal.(*a*) It was held in equity, that A., having thus sanctioned the formation of the canal, was not entitled to re-take possession, but only to a fair compensation, to be determined by the agricultural value of the land taken, as calculated in 1844, and not in 1794; and that persons who had bought A.'s property with notice in the conditions of sale as to the canal, were equally bound by the same equity. So, in Mold *v.* Wheatcroft, an act of parliament (29 G. 3, c. lxxiv.) authorized the lessees of mines to make a railroad to a canal through the intervening lands, on making compensation. The lessees entered into an agreement with a mortgagor in possession for making the railway and paying an annual

(*a*) See Doe d. Patrick *v.* The Duke of Beaufort, 6 Exch. 498.

rent. The mortgagee afterwards entered into possession and received the rent for some time. It was held that the mortgagee and all *808] claiming under *him were bound by the agreement. Assuming that the acts of parliament passed prior to 1855, and the acts done by the plaintiff in relation thereto, are insufficient to take the title out of him, and that notwithstanding all that has taken place he still retains his legal title to the lands in question,—it cannot be doubted that he has in every possible way manifested his assent to the use of the land by this public body for the purposes of the acts, and so given them an equitable right to hold it as against him and all persons claiming under him. The recitals and the several enactments of the 18 & 19 Vict. c. clxxi. all clearly show the intention of the legislature that the corporation of Liverpool should stand possessed of the entire docks and works, free from all encumbrance. The agreement of the 1st of November, 1856, set out in paragraph 43 of the special case, shows that the plaintiff was at that time dealing with the corporation of Liverpool upon the footing of their being owners of the land in question. The referee finds, in paragraph 47, that neither the corporation of Liverpool nor the present board had any notice of the plaintiff's claim, further than from the letters addressed to the engineer of the corporation in 1857, and from the proceedings in parliament referred to in paragraph 52: and these were two years after the passing of the act under which the purchase was made by the corporation of Liverpool from the Birkenhead Dock commissioners. The claim of the plaintiff is wholly inconsistent with the rights conferred upon the defendants by the acts of 1858, 21 & 22 Vict. cc. xc. xcii. The case of Brown v. The Mayor, &c., of London, 9 C. B. N. S. 726 (E. C. L. R. vol. 99), has a material bearing upon the present argument. The corporation of London were empowered by various acts of parliament, passed at a time when they claimed a right to the soil and bed of the river Thames, and exercised the power *809] *of conservancy thereof from Staines Bridge to Yantlett Creek, to borrow money to be expended in the improvement of the navigation of the river westward of London Bridge, and to levy tolls and duties upon boats and other vessels navigating the river between Staines and the bridge, and to charge the moneys borrowed under the acts upon such tolls, by way of life-annuity or bond. The corporation accordingly raised large sums on bonds conditioned for the payment of certain yearly sums "out of the tolls and duties granted and made payable by virtue of the said acts," until payment of the principal; and such yearly sums were duly paid by them down to the passing of the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii. By that act, —which professed to be passed, amongst other things, for the purpose of carrying out an agreement between the Crown and the corporation for the settlement of conflicting claims between them in respect to the right to the soil and bed of the Thames,—the conservancy of the river is taken away from the corporation, and vested in a newly-created body of twelve conservators (of whom seven were members of the corporation of London), in whom all the rights and interest of the Crown and of the corporation in the bed and soil of the river were vested, as well as the power to receive and apply the tolls above mentioned, and all other tolls, dues, &c. There was no

express provision in the last-mentioned act, either for discharging the corporation from liability on these securities, or imposing any liability upon the newly-created body in respect of them. And it was held by the majority of this court (whose decision was afterwards affirmed on error: see 13 C. B. N. S. 828 (E. C. L. R. vol. 106), that the performance of the obligation by the corporation having been rendered impossible by act of the law, the obligation was discharged, and no action would lie *against the corporation thereon. The acts of [*810
parliament now under consideration have a much more extensive operation than the act there in question has. The rights of the Crown and the rights and interests of the public to an almost incalculable extent are involved. It is impossible, therefore, to treat these as other than public acts. If, then, they are public acts, and not only empower but require this public body to take possession of property, they are bound to do so, irrespective of any rights of property which any subject may possess. This doctrine was enforced in this court in a recent case of Gardner, app., Whitford, resp., 4 C. B. N. S. 665 (E. C. L. R. vol. 93). It was there held that the 63d section of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), which imposes a penalty upon the master of any vessel who shall without the permission of the harbour-master moor the same in the entrance (or within the prescribed limits) of any dock or harbour, and who shall not remove the same upon notice, overrides and extinguishes all local and private rights of property therein. "The public conduct of the harbour," says Williams, J., "is regulated by the Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27. The language of the 63d section is quite general. The intention of that section evidently was, to make all private rights subservient to the general convenience and the regulation of the harbour." And Crowder, J., adds: "The 63d section overrides everything where there is a harbour and a harbour-master, no matter what rights of property may exist in private individuals. The words are as general as they can be, and there is nothing to exclude the owners of property from their operation." Down to the year 1857, the plaintiff was entirely silent as to the claim he now sets up, and was urging on the completion of the works. In his petition against the bills which [*811
*passed in 1855, he makes no reference whatever to his title, so as to found thereon any claim to the soil or bed of the Pool; but he prays for the insertion of various enactments for his private benefit. If he had intended or desired, besides reserving his rights at the side of that which is now the Great Float, that his right to the soil of the Pool should be recognised, he should have brought forward his claim at that time. In his petition against the consolidation bill of 1858, the plaintiff for the first time mentions his grant from the Crown. The legislature, having then full notice of his claim, proceed to deal with the property so as to deprive him of all right to interfere with the possession which is essential to the performance of the works contemplated and sanctioned by that act. All the provisions of the act (18 & 19 Vict. c. xcii.) are inconsistent with the existence of any private rights of property in any individual.

Welsby, in reply.—It being conceded that the fee-simple in the land in question was once in Mr. Vyner, it must of necessity remain

in him unless it is taken out of him by some legal conveyance, or by some act of parliament, or by estoppel. Legal conveyance there is none: estoppel there is none; he concurred in the acts of parliament so far only as they and the works done under them were consistent with his title and interest. As to the acts of parliament, the most material of which is the 7 & 8 Vict. c. lxxix.,—not one of them gives the commissioners or the trustees power to take any land above Wallasey Bridge; nothing more than an easement is given. All the works which were contemplated in 1844 lie to the eastward of Mr. Vyner's land. The act of 1845 (8 Vict. c. iv.) does profess to deal with his land; but still below Wallasey Bridge. Neither does the act of 1858 (21 & 22 Vict. *c. xcii.) deal with any land on the west side of Wallasey Bridge.

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ERLE, C. J.—This is an action of ejectment brought by Mr. Vyner against the Mersey Docks and Harbour Board for a certain portion of land. The title of the plaintiff to the whole of the land in dispute in this action is admitted on the part of the defendants; and we come to the consideration of the case cleared of a good deal of the matter which originally stood for discussion, by beginning with the admission that the plaintiff is entitled in fee-simple, unless the defendants can establish that the right has passed from him to them. If the fee simple has passed to the defendants, or if the right of claiming possession by the plaintiff has been taken away in any manner, then the judgment is to be for the defendants; but, unless that is made out, the fee-simple in the plaintiff must prevail at law, and the judgment must be for him.

After giving my very best attention to the many arguments that have been brought forward on behalf of the defendants, and being deeply impressed with the largeness of the value that is at stake, and also taking into consideration that the defendants paid their purchase-money upon the faith and in full belief that they should acquire the right which they have attempted to maintain in this action,—notwithstanding I am deeply impressed with all these considerations, I am compelled to come to the clear conclusion, that at law the plaintiff is entitled to prevail. He has the fee-simple. Has it been taken away from him, first of all, by any of the statutes that have been brought forward? One matter much relied upon on behalf of the defendants, is, that there has been a conveyance from Her Majesty, under which they claim to have judgment in their favour,—the agreement of 1844, and *the indenture of conveyance from the woods and forests in 1853. If the land had belonged to the Queen, and had not been conveyed to the plaintiff before, those instruments of conveyance would have given the defendants either a legal or an equitable title; but, if the land had been before conveyed from the Queen, as it had been in 1830, to the plaintiff, the agreement in 1844, and the indenture of conveyance in 1853, can have no effect. That which has been before granted cannot pass again by a subsequent grant from the same grantor,—unless an act of parliament has intervened and given that which otherwise would be contrary to all the common principles of law. It is said that the title in the defendants in respect of the agreement of 1844, and of the conveyance of 1853, ought to prevail either by virtue of the statute of the 7 & 8 Vict. c. lxxix., or in respect of the statute of 1855 (18 & 19 Vict. c. clxxi.) I think neither of those propositions can be maintained. The

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statute of the 7 & 8 Vict. c. lxxix. was the inception of this very important work. The recital is of the intention to make a tidal dock and other works for the port of Birkenhead; and the 125th section refers to the plans for a tidal basin, and shows clearly to my mind that the lands intended to be taken for the work under that statute were lands comprised in schedule C. which is at the close of that act; and it is in respect of those works that powers are given under sections 55 and 56 to the Crown to make a conveyance to the commissioners. Section 125 contemplating works on lands in schedule C., that statute has no connection with the claim of Mr. Vyner, because the lands in schedule C. are all of them either in Bidston manor or in Poulton manor; all of them lie to the eastward of Mr. Vyner's boundary; and therefore the works contemplated there have nothing to do with the land here in question,—nothing further *than this, [*814
that it contemplated a tidal basin or an embankment across Wallasey Pool,—an embankment on the lands not in Mr. Vyner, but within the boundaries of the other two manors which I have mentioned; and it contemplated an embankment which would throw back the water to the westward, and from that embankment, past Wallasey Bridge, up to Warrington's Bridge, by baying back the water over the land that now constitutes the Great Float,—over the land that is here in question. Under the 7 & 8 Vict. c. lxxix., power was taken so that that land should be permanently covered with water; but it gives the commissioners only an easement upon Mr. Vyner's land, but not any right to the soil and freehold where that water is to lie. That appears to me to be the effect of section 125. Then, the power given by section 55 was a power to Her Majesty to grant lands which are wanted for the purposes of that statute, which I say are out of the boundary of Mr. Vyner's manor; and the statute ought to be construed to enable Her Majesty to grant so much of the soil of Wallasey Pool as will be required for the purposes of this act. Then it enables the commissioners of woods and forests to grant gratuitously all the estate, right, and title of Her Majesty in so much of the soil of the Pool as will be wanted for the purposes of the act. It is limited therefore to different manors. It is out of the boundary of Mr. Vyner's property, and therefore it appears not at all to grant any power of dealing with his land otherwise than I have mentioned. There is nothing like a general contemplation of making a floating dock from the river Mersey at the eastward up to Warrington's Bridge to the westward. I cannot find anything of that sort throughout the act; but it is the inception of a vast undertaking, and it is limited in the manner I have mentioned. Even if there had been a wider intention *recited, and a wider power of granting vested in the commis- [*815
sioners, so as to grant in the name of Her Majesty, I think this statute would not have created a power enabling Her Majesty to grant to the Birkenhead commissioners land which was already vested in another person. It is the most intense interference on the part of parliament, to think that parliament would intend to take away land vested in any of the Queen's subjects, and enable the Queen to grant it away to another person. I do not deny that such right might exist; but I should presume strongly against it; and there are no words intimating anything like such a power, because it is that the commis-

sioners are empowered to grant all the estate, right, title, and interest of Her Majesty in so much of the Pool as is required; and that would only enable them to grant the *lawful* title and estate of Her Majesty, and not to grant any more, for the purposes of that act. And section 56 is to be construed to my mind for the same purpose. This act passed in July, 1844. There is no doubt that the commissioners of woods and forests in November, 1844, agreed to grant the piece of land in question belonging to Mr. Vyner. It is not a grant, but it is an agreement to grant; it would operate nothing; and the defendants do not rest so much on that as they do upon the conveyance of 1853. But the statute to my mind gives no statutable operation to any grant to be made in derogation of the prior grant of this very land to Mr. Vyner.

Then I pass by for the present the matters relating to the conduct of Mr. Vyner and any claim in respect of that; and I come to the statute of 1855, that is to say, the statute for transferring the rights which had passed under previous Birkenhead Dock Acts, first of all, to the Birkenhead commissioners, afterwards to the Birkenhead Dock
*816] trustees, and ultimately from the *Birkenhead Dock trustees to the corporation of Liverpool, which was very much relied on by Sir Fitzroy Kelly, and very much discussed by Mr. Welsby. In my opinion, that statute created no statutable title in the corporation of Liverpool. In 1853, as I have said, the Birkenhead Dock trustees had a conveyance from the commissioners of woods and forests of part of this land. It is certain, to my mind, that the corporation of Liverpool contemplated that they were going to purchase all the land which is covered by the Great Float. But their intention to purchase it, their belief that they had purchased it, the representation of the Birkenhead Dock trustees that they conveyed to them that land,—none of those facts would operate anything or create a title in the corporation of Liverpool, if the Birkenhead Dock trustees had it not. It is quite clear to my mind, that the Birkenhead Dock trustees had it not at the time they made that conveyance. The statute is a statute enabling the trustees to transfer such right as the trustees had to the corporation. And, when it says that they may transfer the docks as they hold them, and that the docks shall mean the whole of the Great Float, and other words of interpretation, there are no words to make valid an invalid title. There are no words there to extinguish the estate of Mr. Vyner, to take the estate out of him, and hand it over to the corporation of Liverpool. But the act was probably passed in the belief that the trustees had the title, and vested in the corporation such title as they had; all parties expecting that it gave a title to that soil; but that expectation, as I have said, not defeating the title of Mr. Vyner. The soil was always the property of Mr. Vyner. It seems to me, therefore, that in both respects the claim of the defendants under this statute fails.

*817] It was said by Sir Fitzroy Kelly that the port is of *that national importance that the statutes vesting the property in the corporation of Liverpool, the immense sum that they had to pay for it, and the vast interests that are at stake in the matter, make it in the nature of a public act, so that it should be construed to have the effect which the corporation have attached to it. But that argu-

ment entirely fails. The enormity of the interest of one million and a half of money, or whatever is the sum which Sir Fitzroy Kelly alluded to, cannot alter the rules of law and the rights of parties. There is no intention expressed by the legislature that Mr. Vyner's right should be taken away from him without compensation. It is the last thing to be expected or imagined in parliament. There are no words that express it, and I therefore think that part of the argument has also failed,—the effect of the statute of 1855.

Then it was said that Mr. Vyner had so conducted himself as to create a species of equitable title in the corporation,—a right to the possession,—something that should be construed to be an irrevocable license; that Mr. Vyner, having originally had a title to this land under the grant of 1830, was supposed to have concealed his rights, and allowed the Birkenhead commissioners and trustees to invest large sums of money in works for the making of this Float, improving the value of the land to an enormous extent, and afterwards the corporation of Liverpool and the Mersey Board, taking up the same line of operations, investing immense sums of money on the faith that the land belonged to them, and, when the value was improved to this large extent, then came forward and set up a title under his prior grant; and that therefore he must either be held to be estopped or be taken to have given a license or created such a title in the defendants as would bar him from recovering the *land in ejectment. I look at the conduct of Mr. Vyner throughout the whole of these years from 1844 up to 1858, and I cannot find that Mr. Vyner has been wanting at all towards those who were carrying on these operations, in any part of that time, in giving them full notice of his rights and his intention to stand upon them and to enforce them. The statute of 1844, according to my construction of it, related to works to be carried on in Bidston and Poolton, and not to works to be carried on in Mr. Vyner's manor, and therefore he had no occasion in the least degree to interfere with them. In the following year, 1845, when the statute was passed,—the first of the Walling Acts,—giving them power to interfere above the line of the embankment, and coming within the boundaries of Mr. Vyner's manor, there is a direct distinct communication from Mr. Vyner's legal advisers to the legal advisers of the Birkenhead commissioners. They met together and were informed that the land had been granted to Mr. Vyner, and was vested in him; they attended at the office of the woods and forests, and there, in company with Her Majesty's commissioners, Mr. Vyner's title is inquired into; it is ascertained to be a valid title; and the statute of 1845 has three clauses introduced into it entirely recognising Mr. Vyner's rights, and making provision that they should not be sacrificed by any of the great works that were going on. It seems to me very difficult to impute intentional misleading to Mr. Vyner. Unless he could be convicted of intentional deception, to lead the corporation, or the trustees, or the commissioners, to go on with these works, and hold out to them that he meant to forego his claim to the soil, and encourage them to lay out a million or more of money in the belief that he never intended to set up a title,—unless some such intentional misleading could be brought *home to him, I should be at a loss to know how the right to recover possession of his land could [*818 [*819

be taken away from him, after so solemn a claim to it, and a recognition of that claim in the first of the Walling Acts, viz. in 1845. But it appears to me, that, from 1845, when the Walling Acts were in force, he has come forward as a frontager when dredging was to be performed, and he has claimed to dredge in front of his own land; and he has done various acts each time entirely inconsistent with his contemplating the value to the neighbourhood from these docks, but always consistent with and holding out,—the land is mine, and I mean to stand on my right. Then there are the letters which passed to the engineer from 1849 down to 1853. Before 1855 the conveyance to the trustees of the Birkenhead Dock was a perfectly unknown fact to Mr. Vyner. He could not interfere with it; he had no knowledge of it; and the purchase by the corporation on the faith of that conveyance could not operate against him. Neither is there any ground of reproach against him, because it was unknown in the office of woods and forests, and not a matter of any public notice that he is fixed with, and so was bound to intervene. The corporation took their act of 1855; and then afterwards, when the Mersey Docks and Harbour Board was established, and they were going to proceed with their works, Mr. Vyner came forward and gave them notice of his rights; and the first of the Mersey Board Acts in 1858, in the House of Commons, without an express statement that the soil was vested in Mr. Vyner, was petitioned against, because it was supposed to interfere with his rights and the toll that he was bound to pay; but there is no pretence for saying that he was keeping back his title. His counsel mentioned it, as is found in the case, in the course of the *820] argument upon the petition that he brought *forward. The Mersey Board then learned that the soil of this Float was vested in Mr. Vyner, and they contested that right; and then it was that Mr. Vyner, in his petition to the House of Lords in respect of that very statute, gave in the fullest detail the account of his land from the beginning, and his right as owner of the soil, explaining fully that he had a grant and meant to act upon it, and showing that he always contemplated enforcing his right down to the present moment.

I think, therefore, that the allegation that Mr. Vyner has, in any degree, forfeited his right to bring this ejectment, has failed.

I have attended to the very able argument of Sir Fitzroy Kelly, and to the answer given to it by Mr. Welsby, with more pain than I remember for a considerable time, from the want of ability to apprehend how a legal title vested in the plaintiff could be said to be divested out of him and given to somebody else by any of the minute matters which have been urged. The case has been argued in the ablest possible manner; but I expressed my opinion more than once on the minute detail that was being gone into, because I conceived the simple question to be, Has the legal estate passed from Mr. Vyner; and is he prevented from enforcing it? I could not understand, if he only wrote a letter by his attorney, or permitted a dredging to go on, and took a composition of 13*s.* in the pound for the sum that was due to him, and the various other matters,—how that could create a right in the defendants to take away his legal title.

There is no doubt that under the Walling Acts, and under the

works that have been carried on, much has been done in front of Mr. Vyner's land. Sometimes he has paid for it; sometimes I believe it has been at the expense of the corporation; and it may be that in *respect of part of that wall there may be something in the nature of an irrevocable license, if any of the walls are vested in him. But it is perfectly clear to my mind, that, whether it be an easement of water penned back on the soil, or whether it is in the nature of a statutable easement or right to put walling, and to keep in the water on his land,—whether it be either of those rights or easements, they are totally distinct from taking away his right to the soil. Mr. Vyner has said in this action, "that soil is vested in me." He has said, by his counsel, "I do not want to turn you out of possession of that which is my right as owner of the soil; you may keep your docks, you may keep your Float, and you may have all the rights which the legislature contemplated; but I claim to have that property, and if you mean to deprive me of it, you must do it on the terms which are universal where a landowner is deprived of his right under the authority of an act of parliament; you must do it, making me compensation for my right." I understand from the learned counsel representing Mr. Vyner on the present occasion, that he claims compensation, not in respect of the increased value that the land may have derived whilst these works were going on; but he says, "You must take me to have always had this land and always intended, before it vested in you, that you should buy me out; and of that right which I claim here you must give me the value as it stood before you made these large investments upon it." [*821

I have used my utmost effort to do justice to the case on the part of the defendants, because (as I have said more than once) it seems to me they have invested enormous purchase-money on the faith that they had the right to this land. I do not believe that the trustees of Birkenhead ever intended to misrepresent anything; but probably, the commissioners of *woods and forests having conveyed the land to Mr. Vyner, some other commissioner may have dealt with the other parties, so that they granted over again that which had before been granted; and the corporation of Liverpool erroneously believed that they had got it. It is perfectly certain that neither the representation of the vendor nor the belief of the vendee, would take away the right of a third party, a stranger to the conveyance, who did not in any way intervene or join in the passing of that land. I look to the case on behalf of the defendants with the full sense of what they paid,—in the belief that they were paying purchase-money for this land. They are disappointed. In my judgment, they must buy out Mr. Vyner's interest. I think our judgment should be given in this action of ejectment for the plaintiff. [*822

WILLIAMS, J.—I am of the same opinion. For the reasons which have just been given by my Lord, and which I do not feel myself called upon to repeat, I think there is nothing in any of the statutes to which our attention has been called, or in the conduct of the plaintiff, which has taken out of him the admitted legal title which he had in the lands in question, or which has precluded him from recovering, at all events in a court of law, the possession of them from the defendants.

WILLES, J.—I am of the same opinion.

BYLES, J.—I am of the same opinion. I wish to make one observation upon the construction of section 55 of the 7 & 8 Vict. c. lxxix. I apprehend that section,—I mean as to the recital of the Queen's right,—is to be construed with reference to the right of the Crown to the soil between high and low-water mark. As it seems *to me, all it means is, that, as Her Majesty in right of Her Crown is entitled to the fundus or soil between high and low-water mark on the shores of the river Mersey, so she is entitled to the same land on that part of the shores of the river Mersey which is intercepted by the penning back the water of the Pool. Therefore, it seems to me that it is plain that this portion of section 55, and the recital of the Crown's title, has nothing to do with the larger and upper part of the Pool. That being so, even if there had been, instead of the recital that Her Majesty was "or claimed to be" entitled, a recital that she "*was* entitled," it does not seem to me that it would touch this case. I do not propose to add anything more, except simply to say that it is conceded on both sides that the agreement to grant, which took place in November, 1844, was not only inconsistent with this view of the case, but inconsistent with the admitted title at that time of the plaintiff; and, that agreement having been made in November, 1844, before the next session of parliament, and at an early period, to wit, in February, 1845, the plaintiff puts in his solemn claim; and I see nothing in the subsequent proceedings to entitle the defendants to say that he has acquiesced in what has been done. I fully agree with what has fallen from my Lord, that the subsequent statutes of the 17 & 18 Vict. c. cxcii., and the 21 & 22 Vict. c. xcii., are mere transfers to successive bodies of what the original grantees had.

*823]

Judgment for the plaintiff.

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*824] *MARTYN v. GRAY. *June* 6.

The defendant advanced money to one G., who was engaged in getting up a company to work a mine in Cornwall, receiving as a security a deposit of 250 shares in the mine, with an option to take the shares in satisfaction pro tanto, such option to be declared within fourteen days. The defendant never did in terms declare his option to accept the shares: but he went down to the mine, made inquiries and obtained reports as to the condition and prospects of the mine and as to the cost of an engine to be used there, and on one occasion assisted in paying the miners' wages: he also permitted the captain of the mine, without contradiction, to represent him as a capitalist from London who had a large interest in the mine, and intended to work it vigorously.

In an action by a person who had supplied goods to the mine upon the faith of representations by the captain that the mine was being worked by a person of substance whose name he was not authorised to give,—Held, that the above was evidence from which the jury were warranted in inferring that the defendant was a partner, although his name was never mentioned,—personal identification being sufficient.

THIS was an action for goods sold and delivered. Plea, never indebted.

The cause was tried before Byles, J., at the last Spring Assizes at Bristol. The facts which appeared in evidence were as follows:—The plaintiff is a merchant carrying on business at Wadebridge, in the county of Cornwall. The claim in this action was for 236*l.* 7*s.* 4*d.*, for "goods sold and delivered by the plaintiff to the defendant as

a partner or adventurer in the Wheal Messer Mine Company," and for interest thereon. The Wheal Messer was a mine formerly worked by a cost-book company, with the adjoining mine called Tretoil, under the name of The Tretoil and Messer United Mines. One Rich was a shareholder in and also the resident manager and captain of these two united mines, and so continued until the 16th of July, 1860, when the Tretoil and Messer United Mines Company found it expedient to abandon the working of the Messer mine, and sell the materials thereon. After the sale, the same company continued to work the Tretoil mine. The Messer mine having been surrendered to the lord, one Gregg, in September, 1860, obtained an agreement for a lease, and proceeded to work it. He also obtained possession of Tretoil mine, and retained Rich as captain; and he continued to work it down to the end of October, 1861, when he was obliged to abandon it for want of means.

*The defendant is a colonial broker in Mincing Lane, London, in partnership with one Walker. The firm had been in [*825 the habit of making advances to Gregg, on the security of warrants, whilst Gregg carried on business as a general merchant in London; and a considerable balance was due to them upon these transactions. On the 4th of April, 1861, Gregg obtained from the defendant a further advance of 160*l.*, for which he gave the following acknowledgment:—

"London, 4th April, 1861.

"Received this day of Thomas Gray & Walker the loan of one hundred and sixty pounds, in consideration of which I hereby give to them the option of taking 250 shares in the Messer Mine near Bodmin, Cornwall, at the price of 12*s.* 6*d.* per share: *such option to be declared in fourteen days.* The above loan of 160*l.* to go towards purchase-money of said shares in the event of Gray & Walker accepting the same: And I hereby engage to repay the said loan of 160*l.* at the expiration of two months from this date. Interest as on the previous loans or advances, in the event of their declining the last-named shares."

On the evening of the 4th of April, the defendant accompanied Gregg to Bodmin, from which the Tretoil mine was distant about two miles, and was present at the bank there on the following day, when the money the proceeds of the last-mentioned check was handed to Gregg. On this occasion, Rich, the captain of the mine, represented to the manager of the bank, in the defendant's presence, that the defendant was one of the parties interested in the mine. The defendant also accompanied Gregg to the mine, and was by him introduced to Rich, the captain of the mine, and assisted in the payment of the miners' wages.

In July, Gregg applied to the defendant's firm for a *further [*826 loan of 120*l.*, telling him, as he had told him on previous occasions, that his expectations from the mine were such that he should in a short time be able to repay all that he had borrowed. This amount was advanced to Gregg by a check of the defendant's firm payable to Gregg's order, and Gregg gave the firm his acceptance for the amount at one month's date.

On the 19th of July, Gregg, being then at the mine, wrote to the defendant as follows:—

"Bodmin, July 19th, 1861.

"Dear Sir,—I have been to the mine, and have reason to be much more pleased. A sample of ore which Captain Rich has assayed gave 70 per cent. for tin; but I shall be able to send you a full report, with various specimens and calculations, either before or after my return in a few days. I have had a long conversation with Mr. Stokes; and we have at length come to terms, subject to the approval of Mr. Simmons and his wife on Monday; and I am to have the lease at once. It is more a matter of form that we see Simmons than anything else. The terms are very favourable. We have arranged a place for stamping a large quantity of tin. The work is only deferred for a few days, of which delay you will, I think, soon see the advantage. Stokes is to withdraw the notice. S. G. GREGG."

On the 9th of August, 1861, the defendant made Gregg a further advance of 100*l.*, for which Gregg gave the firm the following acknowledgment:—

"I acknowledge to have borrowed from you this day the sum of 100*l.*, which, together with 120*l.* for which I have passed you my acceptance, I agree to repay you within four weeks from this date. Should such sum not be then repaid, I further agree to hand over to you all the proceeds from sale of ore at Messer *Mine near Bodmin, beyond the working expenses, up to 220*l.*, as the same are received, on the understanding that such payments are to be deducted from the 220*l.* above agreed to be repaid you. I also agree to hand you as a gift, for consideration of above loan and previous kindnesses, 780*l.* of shares in Tretoil Mine, as soon as the arrangement with Mr. Turner is carried out."

*827]

In addition to the above facts, the following letters were relied on by the plaintiff, as showing that Gray was either an actual partner in the mining adventure in question, or at least had so conducted himself as to induce the plaintiff to believe that he was a partner therein:—

"Strickstenton, Lanlivery, Bodmin.
"April 4th, 1861.

"Dear Sir,—I am and have been very busy. My report shall be forwarded in a day or two. I have been about pretty much, looking into matters about an engine. The size required are very scarce. I will, however, undertake to erect a new 24-inch cylinder, with a 9-tons boiler, ample fly-wheel stamp-axle, to complete for 175*l.* Remember, this is new, that the western part of *your sett* is, I think, the most important. A shaft should be sunk in that ground. This same engine would command this as well as the stamping. But, will Tretoil engine command this shaft? No, is my answer. What then? If you want to sink a shaft (it should be done immediately), another engine must be erected with a similar expense. Take my advice once for all. Wait for my report. Compare this with Captains Rich and Johns; also the views of J. Williams. If not satisfied, call in another good man. I repeat, they two mines together, unless you lay out and erect larger power on Tretoil, will never pay. Rich knows it: and, if you go on as he wishes, you will not rejoice, but repent.

"J. HODGE."

*"12th April, 1861. [*828

"Wheal Messer.

"Dear Sir,—I herewith enclose my report of this mine. I hope it will be explicit and satisfactory to you. If not, please put the questions, and I will readily answer the same. I have sent a copy to Mr. Gregg. I repeat, do not by any means touch Tretoil. If you do, you will, I am sure, burn your fingers. Messer of itself will do; but, together with Tretoil, unless you lay out for machinery as stated in my report, it will be a total loss. J. HODGE."

"The Mines near Bodmin.

"December 20th, 1861.

"My dear Sirs,—I write in haste to say that Mr. Goon and others are now going over these mines. I shall not be able to inform you of the conclusion arrived at as to the value, &c., till Monday or Tuesday; but it occurred to me that you would be glad to hear we were pushing on the business, and therefore I write. Hoping that you will soon reap the advantage I expect and desire from this enterprise, I am, &c. S. G. GREGG."

"Bodmin, 6th March, 1862.

"Messer and Tretoil.

"Dear Sir,—Since my return from London, an officer from the Stannary Court has taken possession of all the machinery on these mines; and, unless the matter is soon arranged, they will all be brought to the hammer. I hear the men are advised that the part you took with Mr. Gregg when here some time since, will fix you as one of the principals, and that they have a claim on you for their wages. It has occurred to me there is a chance now of your recovering all your advances, by the purchase of the materials *on Tretoil, which [*829
I have no doubt can be had for a sum considerably below what Mr. Longbottom agreed to give. If you think these suggestions worth your consideration, and will let me hear from you, I will endeavour to ascertain what can be done in the matter. If anything is done, it must be done promptly. I am confident a good thing can be made out of it. R. RICH."

"Bodmin, 22d March, 1862.

"Dear Sir,—Nothing has been done with the effects at Messer and Tretoil since I wrote you last. The officer from the Stannary Court is still in possession. There appears to be a question at issue now, whether the Stannary Court shall have the conducting of the sale, or whether the whole affair shall be wound up in the Court of Chancery, under the Winding-up Acts. I believe this matter, as far as the mine and materials are concerned, might be arranged by a suitable offer for the mine, &c. I learned from Mr. Gregg a short time since, that the late committee of management of Tretoil were disposed to accede to this, and to accept a much less sum than originally agreed by Mr. Longbottom. There can be no doubt, that, in the present position of affairs, great advantages may be obtained. I shall be most happy to give you every information. R. RICH."

"Bodmin, 8th April, 1862.

"Messer Mine.

"Dear Sir,—I have just been subpœnaed by Mr. Whitehurst, to give evidence for the plaintiff in the action against you, and to produce the cost-sheets and other papers. I was not aware until Saturday last that any proceedings against you had come to this pitch, when I wrote Mr. Gregg on this subject. Mr. Johns, the proprietor of Tre-
*830] toil, is also subpœnaed. I *should be very glad indeed if this matter could be settled, so as to prevent its pressing hard on you or any other individual. R. RICH."

"Bodmin, 4th September, 1862.

"Messer Mine.

"Dear Sir,—I forwarded to Mr. Gregg, some time since, a statement of account, showing a balance due to me of upwards of 40*l.* I had hoped those affairs would have been arranged ere this, therefore I have not pressed my claim. I shall feel obliged if matters can be so arranged to pay me if only a part of my claim, and shall be glad of a remittance of 20*l.* in the course of a fortnight.

"R. RICH."

"London, September 17th, 1862.

"Captain Rich.

"Sir,—I am in receipt of your note of the 4th instant (which I regret having overlooked), asking me to advance you 20*l.*, part of 40*l.*, which you inform me is owing to you from Messer mine. I beg to repeat, in reply, that I am not, and never have been, a shareholder in the above mine, and am therefore not responsible to its creditors. I regret I cannot assist you, though I much sympathize with you in your unfortunate position as a creditor of the mine.

"T. GRAY."

To rebut the inference attempted to be drawn from these letters, the defendant put in the proceedings on a petition filed by the plaintiff in the Stannary Court against Rich as captain of the mine, to enforce his customary lien upon the machinery and materials. The suit was instituted on the 22d of November, 1861; and the petition contained (amongst others) the following statement,—"That a mine called
*831] Wheal *Messer and Tretoil had been worked and carried on for some years then last past by a company of adventurers; that the defendant (Rich) was the purser and managing agent of the said company, and was sued by the plaintiff as such purser according to the custom; that, at the time of the filing of the said petition, there was due to him (the plaintiff) 236*l.* 7*s.* 4*d.* for goods and materials supplied by him for the use of the said mine and the adventurers therein between the 1st of May, 1861, and the 1st of November, 1861, and that such goods were supplied on the credit of the adventurers in the said mine, as well as on the materials and machinery on the mine." And the petition concluded by praying a decree for payment, and in default a sale of the materials, and also an injunction to restrain the removal of the machinery in the meantime; and, with a view to obtain the injunction order, the plaintiff, on the 26th of November, 1861, made and filed an affidavit setting forth in the very words of the petition his claim against the Wheal Messer and Tretoil mine and the

adventurers therein, as above stated, and that the defendant (Rich) was the purser and managing agent of the company, and was sued by him as such purser according to the custom.

The defendant also put in an affidavit filed by the now plaintiff in the Court of Chancery in December, 1861, in opposition to the suit for winding up the company. The material parts of this affidavit were as follows:—"1. That I have carried on business at Wadebridge for many years last past as a merchant, supplying mines in the county of Cornwall with timber, coals, iron, and other necessary materials: 2. That, for about twenty years last past, I have been in the habit of supplying necessary materials to the Messer and Tretoil mine, which is a cost-book mine, in the parish of Lanivel, in this county, and that such supplies *have always been on credit, as is usual in case [*832 of mines worked under the cost-book system in the said county, and have amounted annually to considerable sums, which have been paid me from time to time on account, but always through the purser of the mine for the time being: 4. That, by the custom of the Stannaries of Cornwall, *I, as a merchant supplying mining materials on credit, look to my lien on the machinery and materials of the mine which I supply*, and which lien is notorious, and is given me by the said custom. I also look to the credit of the individual adventurers in the mine, *when they are known to me:* 6. That, early in May last, Richard Rich, who has been managing agent of the said Messer and Tretoil mine for several years last past, and in whom I placed confidence, told me that the said Tretoil and Messer Company had sold the machinery and materials and mine to a new company, and that such new company had paid for the materials, and were about to work the mine in a very spirited way; and he requested that I would continue to supply the mine as before. I then asked the said Richard Rich to give me the names of the parties who were about to work the mine, *and he said he was unable to furnish me with the names of the parties:* 7. I then assented to supply the said mine, and continued to supply materials accordingly, consisting principally of coals for the purpose of working the two steam-engines, with some small quantities of timber and other materials, from the 8th of May, 1861, to the 26th of October, 1861, both inclusive; in respect of which materials there is due to me, including a sum of 3*l.* for interest thereon, a sum of 239*l.* 7*s.* 4*d.*: 8. *Such supplies were forwarded by me to the said Messer and Tretoil mine on the order of the said Richard Rich as agent only, and on the credit of the machinery and materials then being on the said Messer and Tretoil *mine, and not on the credit of any individual person or persons.* In fact, I knew nothing of the supposed new com- [*833 pany of adventurers beyond what I had heard from Rich, of whom I frequently afterwards inquired who the adventurers were, and he always gave me an evasive answer, but stated that the machinery and materials would be ample security to me; but he assured me, that, if at any time he should discover anything wrong, he would let me know: 11. I insist on my customary lien as against the machinery and materials of the said Messer and Tretoil mine, without reference to the ownership thereof; and I say that a private sale of a mine, or of the machinery and materials thereof, is contrary to the custom of

cost-book mines in the county of Cornwall, and is fraudulent as against customary creditors claiming a lien on such mine."

On the part of the plaintiff, it was submitted that the evidence, and particularly the memorandum of the 4th of April, 1861, and the conduct of the defendant when at Bodmin and at the mine on the following day, showed that he had an actual interest in the adventure, or that, at all events, he had so held himself out to the plaintiff and other persons dealing with the mine as to render himself liable for goods supplied for the use of the mine.

For the defendant it was submitted that there was no evidence to warrant the jury in finding that the defendant ever was a shareholder or partner in the mine; and that the transaction of the 4th of April, 1861, amounted to no more than a deposit of the shares as security for a loan, with an option in the defendant to become the owner, which option he had never declared.

The learned judge in his summing up,—after laying down to the jury the general principles of law as to partnership, and as to holding oneself out as a partner, *told them, that, if the defendant went
*834] down to the mine, as represented, and conducted himself as a person having the interest of a partner or co-adventurer in the mine, that was a sufficient declaration of his option to take the shares mentioned in the agreement of the 4th of April, 1861; and that they might from that and all the other evidence in the cause infer that the defendant was actually a partner: and ultimately he left to them the following questions,—first, had the defendant the interest of a partner or co-adventurer in the mine?—secondly, did he hold himself out to the world as a partner?—thirdly, did he so hold himself out to the plaintiff?—fourthly, did the plaintiff trust him as a partner?—observing that, if the defendant's conduct was equivocal, his real interest might explain it.

The jury returned a general verdict for the plaintiff for the amount claimed.

Montague Smith, Q. C., in Easter Term last, obtained a rule calling upon the plaintiff to show cause why there should not be a new trial, "on the ground of misdirection of the judge in directing the jury that they might infer from the evidence that the defendant had held himself out to the plaintiff as a partner, and that the plaintiff had supplied the goods on the faith and credit of the defendant; and on the direction given to the jury by the judge on those questions."

Collier, Q. C., *Prideaux*, and *Murch*, now showed cause.—There was abundant evidence to warrant the finding of the jury that the defendant had held himself out as a partner in this mine, independently of the evidence that he was a partner in fact. He goes to the bank at Bodmin, where he is introduced by Rich, the captain of the mine, as a party having an interest *in it, and money is paid to Gregg
*835] who came with him. He hears Rich say, "These two gentlemen (meaning Gregg and the defendant) are the most influential adventurers of the mine, and intend to work it most extensively," and he says nothing. He is then found at the mine, assisting in paying the miners' wages, and otherwise conducting himself as a party deeply interested in the adventure. This, it is submitted, was abundant and almost conclusive evidence of his being a partner. Then, the corres-

pondence with Hodge and with Rich was also strongly corroborative of the other circumstances, and all tended to show that he had in fact exercised his option under the agreement of the 4th of April, 1861, and that he was an actual partner. [BYLES, J.—His name was never mentioned in connection with the mine.] He was, nevertheless, abundantly identified as the person for whom Rich was acting: and there can be no doubt that Rich acted in pursuance of his authority in representing him to the plaintiff as a partner, although his name was not mentioned. It was entirely a question for the jury. In Dickenson *v.* Valpy, 10 B. & C. 128, 140 (E. C. L. R. vol. 21), 5 M. & R. 126, Parke, J., says: "If it could have been proved that the defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it, and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner." [BYLES, J.—That was, in substance, the way in which I left the case to the jury here.] It was quite enough to entitle the plaintiff to retain his verdict, if there was reasonable evidence to sustain the first proposition which was presented to them.

**Montague Smith*, Q. C., *Karslake*, Q. C., and *Turner*, in support of the rule.—The main question is, whether the plaintiff [*836 was induced to give credit to the mine on the representation that the defendant was a partner therein. According to the judgment of this court in Fox *v.* Clifton, 6 Bingh. 776 (E. C. L. R. vol. 19), 4 M. & P. 676, the holding oneself out as a partner imports at least the voluntary act of the party. The court there say: "The holding oneself out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act of the party so holding himself out. It implies *the lending of his name to the partnership*, and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a shop door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, are the very grounds upon which he is estopped from disputing his liability as a partner." Do the facts bring the present case within that rule? It is said that the defendant so conducted himself towards Rich, the captain of the mine, as to induce Rich to believe that he had an interest in the adventure. That possibly might have rendered the defendant liable to Rich,—for his salary, for instance,—but it could not authorize Rich to repeat to third persons all that the defendant had said to him or had done in his presence; still less would it warrant Rich in pledging the defendant's credit upon the faith of his own conclusions or surmises from the defendant's words or acts. It is clear that no express authority was given by the defendant to Rich to order goods for the mine; and, as the defendant was not an actual partner, there *could be no implied authority. The only ground upon [*837 which the case could be fairly rested, is, that the defendant had so held himself out to Rich, and through Rich to the plaintiff, that he is

estopped from denying his liability for goods supplied for the use of the mine. The question is, did the defendant represent, or authorize Rich to represent, that he was a partner? and did the plaintiff give credit to the mine upon the faith of that representation? Alderson *v.* Pope, 1 Campb. 404, n.; Pott *v.* Eyton, 3 C. B. 32 (E. C. L. R. vol. 54). It is not pretended that the plaintiff knew the defendant, or that his name was ever mentioned to him: it is essential that the party sought to be charged as a partner should be personally identified. In Vice *v.* Lady Anson, 7 B. & C. 409, 413 (E. C. L. R. vol. 14), 1 M. & R. 113, Lord Tenterden says: "The plaintiff, at the time when he supplied the goods, did not know that the defendant had or thought she had any interest in the mine. He did not, therefore, supply the goods on her credit." How, then, can it be said that the plaintiff here supplied the goods on the credit of a man who was an utter stranger to him, and whose name he never heard. In Carter *v.* Whalley, 1 B. & Ad. 11 (E. C. L. R. vol. 20), S. and others carried on business *under the name of the "Plas Madoc Colliery Company."* S. withdrew from the firm, which afterwards became indebted to C., no notice having been given to C. or the public of S.'s withdrawing: and it was held that S. was not liable for the debt, there being no sufficient evidence that he had ever, while a partner, represented himself as such to C., or appeared so publicly in that character that C. must have been presumed to know of it. This is not a question of agency, but of knowledge on the part of the creditor. To warrant their finding, the jury must have been satisfied that the defendant did hold himself out as a
*838] partner, and that the plaintiff knew that he *had done so, and that he elected to give him credit. There was clearly no evidence to warrant that. In Gurney *v.* Evans, 3 Hurlst. & N. 122, goods, being ordered by E., were invoiced to "E. & Son," and a bill was drawn for the price on "E. & Son." The bill was accepted in the handwriting of the son in the name of "E. & Son." The son was not a partner, and it was alleged that he accepted the bill only as his father's amanuensis. It was held, that, if the son had so conducted himself that the drawer of the bill might reasonably have believed *and did believe* that he was a partner, he was liable on the bill. It was impossible that this plaintiff could have supposed that he was trusting the defendant when he supplied the goods. The name of the defendant was unknown to him. The defendant was not in any way identified, so as to justify the plaintiff in saying that the supply of goods was upon his credit. And the plaintiff's affidavit was conclusive to show that the supplies were furnished, not upon the credit of any individual, but in reliance upon the customary lien which he claimed in the Stannary Court upon the machinery and materials.

ERLE, C. J.—I am of opinion that this rule ought to be discharged. This is an action brought by the plaintiff to recover the price of goods supplied to a mine; and the defendant is sought to be made liable, not as a contracting party, not as an actual partner in the adventure, but as a person who had permitted himself to be held out as a partner, so that the plaintiff was induced to supply the goods upon the defendant's credit. The case comes before us in this shape, because the learned judge left it to the jury to say whether the defendant had the interest of a partner in the mine, or so held himself out to the world

or the plaintiff, and whether the plaintiff had given credit to him as a partner. *If the first question had been put to them alone, the jury would in all probability have found that the defendant [*839 was in fact a partner. Then, was there evidence to warrant the jury in finding that the defendant held himself out or permitted Rich to hold him out to the plaintiff as a partner. Formerly it was considered sufficient if the party was held out to the world as a member of the firm or company. Now, however, it is necessary that there should be direct evidence that the holding out should come to the knowledge of the plaintiff: he need not hear or see the defendant's conduct; it is enough if the fact has come to his knowledge. I do not rely upon the fact of the defendant's going to the mine, or say that if that were all, it would be sufficient to fix him with liability. But, when he went with Gregg and Rich to the bank at Bodmin to obtain the money which had been remitted to the credit of the mining company, and heard Rich say that he was one of the present proprietors of the mine, and did not contradict it, that to my mind was the same as if the defendant had made the statement himself. I think that would authorize Rich to inform the plaintiff that the defendant had assented to be a partner in the concern. There was quite enough of holding out to render the defendant liable, if it were reported to the plaintiff. The information given to him was, that the mine was going to be worked by Gregg, and that there was another gentleman down from London, a man of capital, who had been to the mine, and that the mine was to be worked with vigour. It was not necessary that this person should be identified by his christian and surname: it was enough that he should be so pointed at as to be distinctly identified. I am of opinion that there was abundant here to satisfy the law in that respect. Then, were the goods supplied on the credit of the person so holding himself out, *and did the fact of the de- [*840 fendant's being so held out to come the knowledge of the plaintiff at the time. At the time that some of the orders were given, Rich said that a man of capital had joined the concern; and the goods were supplied after that. It is clear that that was very good evidence for the consideration of the jury, that the goods were supplied on the credit of that man of capital. The plaintiff, it appeared, was from time to time asking for the names of the adventurers, but was told by Rich that he could not give them. All this was very good evidence for the jury that the plaintiff was looking to the individual adventurers as the persons with whom he was contracting. As the case stood upon the plaintiff's evidence, there was abundant matter to be left for the consideration of the jury: and the learned judge seems to me to have left it to them as he was bound to leave it on that evidence. The main difficulty, however, in the plaintiff's way, was, the evidence of his proceedings to enforce his lien upon the machinery and materials in the Stannary court, and the statements contained in his petition and in the affidavit made by him in the Court of Chancery, in opposition to the winding-up of the company. On these occasions he stated and swore that he supplied the materials the price of which he claims in this action, upon the credit of the machinery and materials of the mine, and not upon the credit of the adventurers. That certainly conflicted most materially with his evidence before the jury on the

trial of this case. It was certainly extremely strong evidence; but it was evidence only; and the learned judge would have been guilty of misdirection if he had not left it to the jury. It was left to them with strong observations on the part of the judge, who told them that
*841] they must look with great scrupulosity at *the plaintiff's evidence, by reason of his having on the former occasion sworn the other way. Upon the whole, I think there was evidence, from the statements made by Rich in his presence, and uncontradicted by him, that he was interested in the mine; and, these facts having been afterwards repeated to the plaintiff, and the goods subsequently supplied, I think there was, notwithstanding the counter-evidence, abundant to warrant the jury in inferring that the defendant had been with his knowledge and assent held out as a partner in the concern, and that the goods in question were supplied to the mine upon his credit. I therefore think there is no ground for disturbing the verdict.

WILLIAMS, J.—I am of the same opinion. I am of opinion, that if the defendant informs A. B. that he is a partner in a commercial establishment, and A. B. informs the plaintiff, and the plaintiff, believing the defendant to be a member of the firm, supplies goods to them, the defendant is liable for the price. That is one proposition which it was necessary for the plaintiff here to sustain, in order to support the direction of the learned judge. The next question is, does it make any difference that the informant, instead of naming the party or giving such a description as will be tantamount to naming him, suppresses his name? I am of opinion that it makes no difference, when the refusal to name him is accompanied by such a description of the person as clearly points him out. It becomes unnecessary to decide the question which was further discussed, viz. whether the proposition I first stated is sustainable, if, instead of informing A. B. that he is a partner, the defendant does acts from which A. B. may fairly draw the inference that he is a partner, because I agree with my
*842] Lord that there was evidence *that the defendant did inform Rich that he was a partner. If the verdict was to depend entirely on whether or not there was sufficient evidence to support the proposition that the defendant held himself out as a partner in such a manner as to justify the persons dealing with the mine to believe that he was so, I should have been by no means satisfied with the verdict. But, considering that there was evidence to support the verdict independently of that, I do not think we ought to quarrel with the conclusion to which the jury came.

WILLES, J.—I am of the same opinion. It is clear from the evidence given on the part of the plaintiff, that the defendant did represent to Rich that he was a partner in the undertaking. Did that give Rich authority to represent to parties dealing with the mine that the defendant was a partner? I apprehend it did. This is not like the cases where the repetition of a man's words has been held not to impose upon him a liability beyond the legal and natural consequences of those words. I allude to Vicars *v.* Wilcocks, 8 East 1, and that class of cases. This is a case in which it was not wrong in the person to whom the statement was made to repeat it; but where, on the

contrary, it was highly probable that he would repeat it. Therefore, even if Rich had not stood in any relation to the mine which would have justified him in repeating it, there would have been strong reason for holding that his repetition of it would have bound the defendant, if it had been acted upon by the plaintiff. But that is not the whole. The relation in which Rich stood to the proprietors of the mine was such that he was authorized to order goods for the use of the mine, and impliedly also to state to the persons who supplied them who were the parties upon whose *credit they were supplied. It is unnecessary to go so far as Lord Tenterden did in [*843 Shott *v.* Strealfield, 1 M. & Rob. 8. There, the plaintiffs were maltsters, and had sold malt to Strealfield & Co.; and the question in the cause was, whether the defendants were partners at the time when the goods were sold, and the bill given for them. It appeared that Strealfield & Johnson had carried on business as maltsters. Johnson went out of partnership, and introduced Green to a witness as his successor in the partnership with Strealfield, and told the witness, in Green's presence, that Strealfield and Green were to carry on the business together from the time of the conversation. The witness was asked whether, after this conversation with Johnson and Green, he reported that Strealfield and Green were partners. Campbell objected that this was not evidence, unless it was shown that the defendants, or one of them, were present when it was reported. But Lord Tenterden said he thought it was; "because otherwise it would be said presently that what was said was confined to the witness, and the plaintiffs could not have acted on it." There is, therefore, the high authority of Lord Tenterden for saying that Rich was warranted in repeating that which was said to him by the plaintiff as to the nature of his connection with the mine. Then, did Rich report that the defendant was a partner? That depends on whether or not the description he gave sufficiently showed that the defendant was the person pointed at. I can entertain no doubt that it was. It described the defendant, and nobody else. Then comes the question whether the plaintiff gave credit to the defendant. Did he believe at the time he supplied the goods, or had he reasonable grounds for believing, that the defendant was a partner in the mine? That has so long been expressed by the short form "Did he give credit to the [*844 *defendant?" that I do not think the jury could have misunderstood what was meant. I see no ground for doubting, now that the matter has been so thoroughly and clearly brought before us, that the direction of the learned judge was correct. I agree with my Brother Williams, that, if the matter turned wholly upon this point, it would have been open to considerable doubt. But, observing how cautiously they were directed, I cannot help thinking that the jury thought the defendant was a partner, of which, in my opinion, there was abundant evidence.

BYLES, J., concurred. Rule discharged.

M. Smith, Q. C., asked leave to appeal, submitting that the matter was of sufficient importance to justify an appeal.

ERLE, C. J.—None of us entertain the least misgiving on the law: and my Brother Byles informs us, that, if the jury had found that the

defendant was not a partner, he would have reported himself dissatisfied with the verdict. Leave to appeal refused.

A partnership was projected to transact business under the firm-name of Drennen & Patterson. Before it went into operation, W. E. Patterson was substituted for F. Patterson, who it was originally contemplated should be a member of the firm. The plaintiffs, however, unaware of the change, gave credit to the firm on the strength of F. Patterson's membership, and they were held justified in treating him as a partner, not only on the ground of general repute, but also on the ground that his declarations that he was a member of the firm, and his conduct as a partner, were brought directly home to them: Drennen *v.* House, 2 Wright (Pa. 1861) 30.

The defendant held himself out both by acts and declarations as a partner in the business of keeping a hotel, and the plaintiff sold goods to him on the strength of this representation: held bound as a partner: Conklin *v.* Barton, 48 Barb. (N. Y. 1864) 439.

If an individual holds himself out, or allows himself to be held out, as a partner, and this is known to a stranger, who contracts with the firm in reliance upon the membership of the ostensible partner, he will be liable on the contract: Moss *v.* Jerome, 10 Bosw. (N. Y. 1863) 220; Atherton *v.* Tilton, 44 N. H. (1863) 452; Walrath *v.* Viley, 2 Bush (Ky. 1867) 478.

In like manner, a member who retired secretly from a firm which had stipulated to indemnify the makers of notes against liability on its endorsements, was held liable to plaintiff, who took a note on the security of this indemnity: Buffalo City Bank *v.* Howard, 8 Tiff. (N. Y. 1866) 500. Notice of the retirement must be brought home to the customer: Reilley *v.* Smith, 16 La. An. (1861) 31; Williamson *v.* Fox, 2 Wright (Pa. 1861) 214; Ellis's Administrators *v.* Bronson, 40 Ill. (1866) 455; Kirkman *v.* Snodgrass, 3 Head. (Tenn. 1859) 370.

*845] *WILLIAMS and Others *v.* THE SWANSEA HARBOUR TRUSTEES. *May* 27.

The trustees of a dock, being about to open a new one under the authority of parliament, issued a notice addressed to ship-owners, merchants, and others, describing the accommodation which their new dock would afford to shipping, and containing a statement that "the depth of water *on the dock sill* was 26 and 23 feet at the highest spring-tides, and 15 feet at the lowest neaps:—Held, that this amounted to a warranty that there was an available depth of water *in the entrance channel* approximating that mentioned in the notice; and that the trustees were responsible to the owners of a ship, who, trusting to the representation contained in the notice, entered the dock to load, and were delayed and put to expense in consequence of the insufficiency of water in the channel to enable her to complete her loading in the dock.

THIS was an action brought by the plaintiffs, the owners of a vessel called the Albion, against the trustees of Swansea harbour, who were incorporated by The Swansea Harbour Act, 1854 (17 & 18 Vict. c. cxxvi.), for loss sustained by the plaintiffs in consequence of the insufficiency of water to enable their vessel to leave the docks with a cargo.

The first count of the declaration stated, that, after the passing and coming into operation of a certain act of parliament made and passed in the 21st year of the reign of Her present Majesty, to wit, The Swansea Harbour Act, 1857 (20 & 21 Vict. c. cxliii.), and before and

at the time of the making of the warranty thereinafter mentioned, the plaintiffs were the owners of a certain ship called the Albion, and the defendants were, under and by virtue of the provisions of the thereinbefore-recited act, the owners of the undertaking, docks, and works in the said act mentioned, and as such entitled to receive certain tolls and rates from all vessels using the docks: That thereupon the defendants, in consideration of the plaintiffs sending their said ship to the docks of the defendants, warranted to the plaintiffs that there should be a depth of water at the entrance to the said docks varying from 26 and 23 feet at spring-tides to 15 feet at the lowest neaps: That the plaintiffs, relying on the said warranty of the defendants, did send their said ship to the docks of the defendants to be there loaded with coals under a certain charter of the *said ship made to a certain person, to wit, one James Burness, upon the faith of the [*846 said warranty: Averment, that, before action brought, all things had happened and all times had elapsed necessary to entitle the plaintiffs to a performance by the defendants of the warranty thereinbefore mentioned, and to sue them for the breach thereof thereinafter mentioned; yet that the defendants broke their said warranty in this, to wit, that there was not at the time of making the same, or at the time of the plaintiffs' ship being in the said docks, or at any other time, a depth of water at the entrance to the said docks varying from 26 and 23 feet at spring-tides to 15 feet at the lowest neaps: By reason whereof the said ship was unable to take on board a cargo of coals in the said docks in the manner and to the extent to which she otherwise might have done; and by reason of the premises the said ship was detained at Swansea for a long and unreasonable time beyond the time which would otherwise have been required for loading the said ship; and the plaintiffs thereby lost all the benefit and advantage which they would have derived from the use of the said ship during the period she was so detained; and also by means of the premises the plaintiffs were forced and compelled to pay large sums of money for the use of certain lighters employed to bring the cargo of coals to the said ship in the roadstead of Swansea, to which she had been compelled to be removed in consequence of the breach of warranty of the defendants, and also to pay other moneys for other services rendered to the said ship in consequence of the said breach of warranty by the defendants.

The second count stated, that, after the passing and coming into operation of the act of parliament in the first count mentioned, and before and at the time of the committing of the grievances thereinafter mentioned, *the plaintiffs were the owners of the ship in [*847 that count mentioned, and the defendants were such owners as in that count mentioned; and that thereupon the defendants, by falsely and fraudulently representing to the plaintiffs that there was a depth of water at the entrance to the said docks, varying from 26 and 23 feet at spring-tides to 15 feet at the lowest neaps, induced the plaintiffs to send their said ship to the said docks of the defendants, to be there loaded with coals under a certain charter-party of the said ship entered into with one James Burness: Averment, that, by means of the falsity of the said representations, the said ship was unable to take on board a cargo of coals in the said docks, in the manner and to the

extent to which she otherwise might have done; and, by reason of the premises, the plaintiffs were damnified as in the said first count particularly mentioned.

The defendants pleaded,—first, that they did not warrant to the plaintiffs that there should be a depth of water at the entrance to the said docks ranging from 26 and 28 feet at spring-tides to 15 feet at the lowest neaps,—secondly, to the whole declaration, not guilty,—thirdly, to the second count, that the said ship was not by means of the falsity of the said representations unable to take on board a cargo of coals in the said docks as alleged, nor were the plaintiffs thereby damnified as in the first count mentioned. Issue thereon.

The cause was tried before Erle, C. J., at the sittings in London after last Hilary Term. The facts were as follows:—On the 3d of October, 1859, the plaintiff Williams, who was master as well as a part-owner of the Albion, entered into a charter-party with one James Burness for the conveyance of a cargo of coal to China. The ship, which was then in the Thames, was of about 1398 tons register. It being determined that the vessel should proceed for her cargo to Swansea, it
*848] *was material to ascertain whether or not there was sufficient depth of water there for a vessel of her size. Swansea had previously been known as a port at which large ships could not load; but many improvements had been made there under the act of 1857 (20 & 21 Vict. c. cxliii.); and the harbour trustees had inserted advertisements in the Shipping Gazette and other newspapers of the opening of their new docks, and also printed cards (one of which had been sent to the plaintiffs' brokers) describing the facilities afforded there. This notice was dated the 23d of August, 1859, and was as follows:—

"Notice to merchants, ship-owners, coal-shippers, and masters.

"Swansea South Docks.

"Notice is hereby given, that the South Docks at Swansea will be opened the latter part of September. The exact day will be named in a future advertisement.

"The additional floating accommodation afforded by the dock consists of thirteen acres, having 4800 feet of quay-wall, *with a depth of water throughout of* 24 *feet;* in addition to which there is a half-tide basin of four acres, with 1600 feet of quay-wall, communicating with the dock by a lock of 300 feet by 60 feet.

"The half-tide entrance gates are 70 feet in width, *with a depth on the sill varying from* 26 *and* 28 *feet at spring-tides to* 15 *feet at the lowest neaps.*

"Facilities for the discharge of ores, ballast, &c., are afforded by hydraulic cranes discharging direct into railway trucks, and for the shipment of coal and iron by hydraulic lifts and tips, combining the advantage of shipping coal either from ordinary trucks or boxes, upon the most approved plans for the prevention of breakage in the hold. There are also five slips for the discharge of timber.

*849] *"There is direct railway communication from the docks, without break of gauge, with the great steam-coal and iron districts of Merthyr, Dowlais, and Aberdare, by the South Wales and Vale of Neath railways; as also with Milford Haven and Gloucester, by South Wales Railway, by which line bituminous coals for gas, household, and cooking purposes are conveyed to the docks. Exist-

ing communication by canal and rail with the Swansea valley affords ample facilities for the shipment of tin-plates, chemicals, iron, steam-coal, anthracite, and culm.

By order of the trustees,

LEWIS THOMAS, clerk."

Upon the faith of this notice,(a) the master of the Albion, assuming it to be an intimation to those who might wish to use the dock that there would not be less than 23 feet of water *at the entrance*, and knowing that that was greater than the draught of his vessel when fully loaded, agreed with the charterer to load her at Swansea. He accordingly left London on the 11th of October, arrived at Swansea on the 16th, and on the following day went into the docks,—which were formally opened on the 23d of September. He immediately commenced taking in his cargo, but was told by the harbour-master that he could not go out with a full cargo, in consequence of the insufficiency of water at the entrance; there being a mud-bank a few feet outside the half-tide entrance gates, but within the pier-heads, which had not yet been removed. After several days' delay and much correspondence with the harbour-master, the vessel was obliged to leave with a part only of her cargo, and anchor in the *roads [*850 to take in the remainder from lighters. The weather being bad, this was a difficult operation; and, after being delayed until the 10th of December, the master was compelled to proceed upon his voyage with a less cargo than the vessel could otherwise have taken. For the expense, delay, and loss thus occasioned this action was brought.

In the Swansea Tide-Tables for 1859 (which were published by the defendants, but which the master stated he had never seen), after describing the old dock accommodation and the dredging operations going on for the purpose of improving it, the new docks are referred to and shortly described thus,—"The outer entrance is seventy feet wide, with 24 feet 6 inches depth of water over the sill at ordinary Spring tides." Allusion is then made to the powers given to the defendants by parliament, and it is said that "works are in progress for deepening the channel from the pier-heads to the entrance to these docks, so as to render available the full depth which is obtained at these locks." And at the foot of each page is a note,—"In 1859, the entrance channel will be deepened to the dock-sill." These tide-tables were put in by the defendants, in order to show that the plaintiffs ought to have known that the depth of water on the sill was no indication of the depth of the entrance channel.

On the part of the defendants, it was submitted that the notice of the 23d of August, 1859, did not guarantee any more than its words literally imported, viz. that there would be a certain depth of water *on the dock-sill*, and not that that depth was maintained throughout the entrance; and evidence was given that all docks are liable to silting, and that the sill is invariably somewhat lower than the entrance, for that *otherwise ships might sustain damage in going in or [*851 coming out.

His lordship, in his summing up, told the jury that the notice pub-

(a) A further notice, in similar terms, was issued by the trustees on the 3d of September, naming the 23d of that month as the day fixed for the opening.

lished by the defendants was not quite like a contract between the parties; but that it was enough if it amounted to a representation to the public, and was acted upon by the plaintiffs; and that it was for them to say whether the master had been led by it to understand that there would be the depth of water therein mentioned at the entrance to the dock. As to the defendants' evidence, he observed that the notice describing the amount of accommodation to be afforded to the public would be perfectly nugatory if it were to be confined to the sill only. And, as to the damages, he told them, that, if they found for the plaintiffs, they would be entitled to compensation for the delay and consequent expense of lighterage, &c.

The jury returned a verdict for the plaintiffs on the first count, damages 406*l.* 3*s.* 9*d.*

Bovill, Q. C., in Easter Term last, pursuant to leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendants, or a new trial, on the grounds,—first, that the printed notice was the only warranty, and was only of the depth of water *on the dock-sill*, not at the entrance to or towards the docks,—secondly, that there was no evidence legally to vary such meaning of the notice,—thirdly, that there was no evidence to go to the jury of the warranty stated in the first count of the declaration,—fourthly, that the verdict was against the evidence.

Lush, Q. C., and *Sir G. Honyman*, showed cause.—The notice issued by the defendants in August, 1859, was calculated to induce ship-
*852] owners and others interested in *the matter to believe that the entrance channel to the new docks had been deepened in the manner proposed. It clearly held out to the public that that which the trustees had over and over again represented they intended to do in 1859, viz. deepen the entrance channel to the level of the dock-sill, had been done: and upon the faith of that representation the plaintiffs are induced to take their ship into the dock. Why state the depth of water on the sill, if that was to be no guide to persons entering the dock? By the 59th section of the 17 & 18 Vict. c. cxxvi., the trustees were required "to make, maintain, and keep the bed or channel from the lock at the south entrance to the town float to the entrance between the piers, or any extension thereof, *at least as deep in every part thereof as the sill of such lock.*" It is true that does not apply to the new dock constructed under the authority of the 20 & 21 Vict. c. cxlii.; but at least it shows what the intention of the trustees was. In Denton *v.* The Great Northern Railway Company, 5 Ellis & B. 860 (E. C. L. R. vol. 85), it was held by Lord Campbell and Wightman, J., that the time-tables of a railway company amount to a contract on behalf of the company with those who should come to their stations, to forward them as stated therein. And in Marlow *v.* Harrison, 1 Ellis & Ellis 295 (E. C. L. R. vol. 102),—where it was held that an auctioneer who advertises an article to be sold without reserve, thereby contracts that the highest bonâ fide bidder shall be the purchaser, and is liable to an action for a breach of that undertaking.—Martin, B., delivering the judgment of the court, says, (p. 316): "We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time-table stating the

times when and the places to *which the trains run. It has been decided that the person giving the information advertised for, or a [*853 passenger taking a ticket, may sue as upon a contract with him: Denton *v.* The Great Northern Railway Company. Upon the same principle, it seems to us that the highest bonâ fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bonâ fide bidder, and, in case of a breach of it, that he has a right of action against the auctioneer." Here, the plaintiffs chartered their vessel to take in a cargo of coals in the defendants' dock upon the faith of the promises held out in their notice, and the defendants are responsible for all the damages resulting from the breach of their implied warranty.

Bovill, Q. C., and *Milward*, in support of the rule.—The plaintiffs by their declaration undertake to show that the defendants warranted to them that there was a depth of not less than 23 feet at spring-tides throughout the entrance of the channel. Their claim must rest upon the notice of the 23d of August, 1859, and upon that alone; for, as to the statements in the tide-tables, it was admitted that the plaintiffs never saw them. "Sill" is a perfectly well-known term. In Webster's Dictionary it is described as the "lowest timber of any structure." The notice speaks only of the depth of water *on the sill*, not the depth of the channel; and its language is not to be strained. There is nothing in the statement that was calculated to mislead: every mariner has ample means of information, *and well knows that in all the docks and harbours in the Thames and on the coast of [*854 England the depth of water on the sill is greater than that at any other part of the channel or entrance. If it were not so, scarcely any heavily-laden vessel could safely enter any of them. [ERLE, C. J.—I left it to the jury in substance to say whether the statement of the depth on the sill was an indication of the approximate depth of the entrance or channel.] If it was for the court to construe the document, nothing would justify a departure from its words; and, if it was for the jury, all the evidence was one way.

ERLE, C. J.—I am of opinion that this rule must be discharged. If the construction of the notice of the 23d of August, 1859, was for the court, I retain the opinion which I expressed at the trial, viz. that it amounted to an offer to the public of a certain amount of accommodation in the new dock, and professed to hold out that the depth of water on the dock-sill at spring-tides was not less than 23 feet; and that I construe to amount to a warranty that ships wishing to use the dock would find an accessible entrance thereto of that depth, and that their contract was broken if that was not so. It appeared, that, although the depth of water on the sill varied from 26 to 23 feet at spring-tides, the greatest depth of water in the entrance channel was 19 feet; so that a ship going into the harbour on the faith of the statement of the depth of water on the sill, could not come out with a full cargo if she drew 19 feet. Where the representation has reference to the depth of water at the entrance of a dock, the depth of water on the sill is of no importance unless the depth of the whole of the

channel of approach approximates to that on the sill. I am of opinion
*855] that *the notice amounts to a representation to all the world that there is available access to the dock-gates of the depth mentioned, or at all events approximating thereto. It is said that the dock-sill is always somewhat lower than the bed of the channel, lest vessels should be injured by grounding on a hard substance. That may be so; but the question here is whether the state of the channel substantially corresponded with the statement in the notice. If the question was for the court, I am clearly of opinion that it did not. If it was a question for the jury, I think the jury were well warranted, upon the evidence which was before them, in coming to the conclusion they did. The ship was chartered to load in this particular dock upon the faith of the representations contained in the notice. There was evidence on both sides as to the way in which nautical men would understand the notice,—evidence which my learned Brothers think ought not to have been received, but which I admitted as it was not objected to. The matter was left to the jury, and they found for the plaintiffs; and I see no reason why their verdict should not stand.

The rest of the court concurring, Rule discharged.

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*856] *SEARLE and Another *v.* BLAISE. *June* 12.

The sheriff having seized under a fi. fa., notice was given of a prior act of bankruptcy by the debtor, and a petition was filed under which he was adjudicated bankrupt, the goods remaining unsold, and the messenger took possession of them:—Held, that the sheriff was not entitled to a rule calling upon the assignees to pay him the expenses of preparing for a sale of the goods.

ON the 10th of April, 1863, the sheriff of Middlesex seized the defendant's goods under a fi. fa. at the suit of the plaintiffs. The 74th section of the Bankruptcy Act, 1861,(*a*) requiring the sheriff to sell by public auction, and the lease under which the defendant held precluding a public sale upon the premises, the sheriff was compelled to remove them, whereby he incurred expense to the amount of 12*l.* 2*s.* 6*d.*

After the seizure, and whilst the goods remained in the hands of the sheriff, unsold, the sheriff and the execution-creditor received notice of an act of bankruptcy committed by the debtor prior to the seizure; and a petition was filed under which the debtor was duly adjudicated a bankrupt, and the messenger of the court of bankruptcy took possession of the goods, and the sheriff retired.

Quain, on behalf of the sheriff, now moved for a rule calling upon the assignees of the judgment-debtor to show cause why the Master
*857] should not be directed *to tax and allow him the expenses of the removal of the goods and preparing for the sale.—The sheriff's fees are now regulated by the 7 W. 4 & 1 Vict. c. 55. That act

(*a*) The 74th section of the 24 & 25 Vict. c. 134, enacts that, "wherever the goods and chattels of a debtor are sold under an execution upon any judgment recovered in any action or suit brought for the recovery of a debt, money demand, or damages against any debtor, exceeding 50*l.*, such goods and chattels shall in all cases, unless the court shall otherwise direct, be sold by the sheriff by public auction, and not by bill of sale or private contract, and such sale shall be publicly advertised by the sheriff on and during three days next preceding the day of sale."

recites that "it is expedient to amend the laws relating to the fees payable to sheriffs, under-sheriffs, deputy-sheriffs, sheriffs' agents, bailiffs, and others the officers or ministers of sheriffs in England and Wales, and to give the courts of record at Westminster Hall a due control over such fees; and also to provide a summary remedy against such officers and others as shall extort or receive other or greater fees than by law they shall be entitled to." It then proceeds to repeal part of the 42 E. 3. c. 9, the 1 H. 5, c. 4, and part of the 23 H. 6, c. 9; and s. 2 enacts, that "from and after the passing of this act, it shall lawful for sheriffs, or their officers, concerned in the execution of process directed to sheriffs, to demand, take, and receive such fees, and no more, as shall from time to time be allowed by any officer of the several courts of law at Westminster charged with the duty of taxing costs, under the sanction and authority of the judges of the said courts respectively." Under this statute a scale of fees was settled by the judges, at the end of which appears the following note,—"For any duty not herein provided for, such fee as the Master in his discretion may allow." [BYLES, J.—Has not the sheriff a remedy against the party who set him in motion?] It would seem not: he is acting as the officer of the court. [BYLES, J.—In Rawstorne *v.* Wilkinson, 4 M. & Selw. 256, where the sheriff levied under a fi. fa., and received the money, and afterwards, the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back with the assent of the plaintiff, it was held that the statute 43 G. 3, c. 46, did not take away his remedy *by action of debt against the plaintiff for his poundage.] In Bilke *v.* Havelock, [*858 3 Camp. 374, Lord Ellenborough says: "The law knows of no promise to pay the sheriff for executing the King's writ. Such an action as this was never heard of in Westminster Hall. It is the duty of the sheriff, under a writ of fi. fa., to seize the goods in his bailiwick belonging to the defendant. If he is in any doubt as to the property, he may impannel a jury for his own protection. If the goods are sold, he receives in poundage the specific recompense for his trouble which the law has provided. He is entitled to none for seizing and remaining in possession of goods belonging to a stranger. The office of sheriff would become a very lucrative one, if he could maintain an action for every ineffectual attempt by his officers to execute a writ." That case was referred to Cole *v.* Terry, 5 Law Times, N. S. 347, where it was held that a sheriff's officer having made an ineffectual levy under a fi. fa. upon the goods of a defendant, by reason of a claim by an assignee (under a bill of sale), upon which the officer was obliged to abandon the possession, is not entitled to sue the attorneys who sent the writ for execution to the sheriff, for his charges. [BYLES, J.—Miles *v.* Harris, 12 C. B. N. S. 550 (E. C. L. R. vol. 104), shows, that, although the sheriff is not entitled to *poundage*, where, after seizure and before sale, the judgment and all subsequent proceedings are set aside for irregularity, yet there are cases where he may sue for expenses.] Where the sheriff has been allowed to recover against the execution-creditor or the attorney, it has been where they have done something to prevent the sheriff from getting his poundage. [WILLES, J.—What jurisdiction have we over the assignees without the Queen's writ? The sheriff might have gone on

*859] to sell the goods: he waives that right in favour of the *assignees: surely they ought to pay him. The expenses, however, cannot be recovered in this way.]

ERLE, C. J.—It would be idle to grant a rule which the assignees would not be bound to obey. The 73d section of the Bankruptcy Act, 1861, seems to have made a special provision for such a case as this: it enacts, that, "if any execution shall be levied by seizure and sale of any of the goods and chattels of any trader debtor upon any judgment recovered in any action personal for the recovery of any debt or money demanded exceeding 50*l.*, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels: Provided always, that, unless in the meantime a petition for adjudication of bankruptcy against the debtor be presented, the sheriff or other officer making the levy shall proceed with the execution, and shall at the end of seven days after the sale pay over the proceeds, or so much as ought to be paid, to the execution creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so received by the creditor shall be paid by him to the assignee under the bankruptcy, but the sheriff or other officer shall not incur any liability by reason of anything done by him as aforesaid: Provided also, that, in case of bankruptcy, the costs and expenses of such action and execution shall be retained and paid out of the proceeds of the sale, and the balance only, after such payment, be paid to the assignees." This is a question of considerable importance for the sheriff. We cannot by rule of court order the assignees to pay him the expenses

*860] which he has incurred; nor do we *give any opinion as to whether or not an action will lie. If it be casus omissus, the remedy will be obvious. Probably the better course will be to state a case for the opinion of the court.

The rest of the court concurring, Rule refused.

END OF TRINITY TERM.

ADDITIONAL CASES

FROM

CONTEMPORANEOUS REPORTS.

IN THE HOUSE OF LORDS.

STEFANOS XENOS, and Another, Appellants; FRANCIS D. WICKHAM, Respondent. *June* 25, 26, 1866; *May* 8, *July* 16, 1867.(a)

A policy of insurance purported to be "signed, sealed, and delivered" by two of the directors of an insurance company in the presence of their secretary, and according to the powers vested in the directors by the deed of settlement of the company. This statement was taken, as against the company, to be conclusive that it was not only duly signed and sealed, but also duly delivered.

A policy "signed, sealed, and delivered," is complete and binding as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it.

It is not necessary that the assured should formally accept or take away a policy in order to make the delivery complete.

After the broker had prepared a slip, and the proposed insurer had accepted it, and had prepared a policy in accordance with it, a desire was expressed by him, and assented to by the underwriter, that the policy should be cancelled, on which a cancellation was in form effected:—

Held, that this was not effectual as to the assured, who had not, in fact, given the broker any authority to cancel the policy.

Per LORD CRANWORTH:—It is no part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into.

A., a broker, was instructed to effect for B., a shipowner, an insurance on a ship. A. gave a slip to C. (the authorized representative of an insurance company), which was accepted, and a policy prepared accordingly. When the policy (with the account debiting A. with the premium) was sent to A.'s office, "duly signed, sealed, and delivered," his clerk said there had been a mistake, that the policy ought not to have gone forward, and that there was no premium due. This was repeated by another clerk of A., who came to C.'s office for that purpose, and requested the cancellation of the policy. C. acted on these representations (which, however, had been made by A.'s clerks without any authority from B., the shipowner), and cancelled the policy, but charged A. with the stamp duty paid, and gave the policy to A. to enable him, if possible, to get a return of the stamp duty on it. The ship was lost, and B. made his claim for the loss:—

Held, that the circumstances were sufficient to show an execution and delivery of the policy, and that the unauthorized act of A. afforded no answer to the claim.

THIS was an appeal against a decision of the Court of Exchequer

(a) Law Rep. 2 H. L. C. 296.

Chamber,(a) which (diss. Mr. Justice Blackburn and Mr. Justice Mellor) had affirmed a decision of the Court of Common Pleas,(b) in an action between these parties on a time-policy on a ship.

The appellants are shipowners, carrying on business under the name of the Greek and Oriental Steam Navigation Company, and as such were the owners of the ship Leonidas. The respondent is the chairman and representative of the Victoria Fire and Marine Insurance Company. The declaration alleged, in the usual form, that the plaintiffs caused their vessel to be insured by this company for the space of twelve months, from the 25th of April, 1861, to the 24th of April, 1862, on a policy valued at 1000*l.*, upon a ship valued at 13,000*l.*, and the loss was alleged to have occurred by perils of the sea. There was also a count in trover for the policy.

The defendant pleaded several pleas, some of which alone are material. The first denied the insurance as alleged; the fourth stated that after the making of the policy the same remained, with the plaintiff's consent, in the hands of the defendant, and whilst it so remained, and before the loss, the plaintiffs requested the defendant, for the purpose of putting an end to the policy, to cancel the same and make a return to the plaintiffs of the premium; that, in compliance with such request, and before the loss, the defendant did cancel the policy, and thereby put an end to the risk, &c. To the count in trover the defendant pleaded not guilty, and not possessed.

Issue was taken on all these pleas, and the cause was tried before Lord Chief Justice Erle, when it appeared that on the 25th of April, 1861, the plaintiffs employed Mr. Lascaridi, an insurance broker, to effect for them a policy on the ship Leonidas for 2000*l.*, at 8*l.* 8*s.* per cent., from the 25th of April to the 25th of October. In the case of private underwriters at Lloyd's, it is customary to have only one slip, which is signed by the different underwriters for the amounts for which they are willing to undertake the insurance. In the case of insurance companies a separate slip is prepared by the brokers of the assured for each company, and the policy is afterwards prepared and filled up from the slip by the officers of the company, and is kept by the company until sent for by the assured or his broker.

In accordance with the usual practice, Lascaridi prepared for the respondent's company a slip embodying the terms of the proposed insurance, and got it initialed by Mr. E. J. Sprange, a clerk of the company, for the sum of 2000*l.* This was left at the office of the company in order that the policy might be made out. Before the policy was made out, the plaintiffs sent to Lascaridi a letter, dated 29th of April, 1861, desiring him to "cancel Leonidas insurance, and insure the same for all the year and for all seas at 10*l.* 10*s.* per cent." On the 30th of April Lascaridi called at the respondent's office, and stated that he did not wish the policy already mentioned to proceed, but desired to effect another. The slip for the insurance for 2000*l.* for six months was then destroyed, and another slip was prepared by him, and initialed by the respondent's clerk, "E. J. S.," on the Leonidas for 1000*l.* for twelve months, from the 25th of April, 1861, on "hull, stores, and machinery, valued at 13,000*l.*" On the 1st of May Lasca-

(a) 13 C. B. N. S. 435 (E. C. L. R. vol. 106).
(b) 13 C. B. N. S. 381.

ridi sent to the plaintiffs an account debiting them with the sum of 338*l.*, as payable by them in respect of insurances on the Leonidas, and drew on them, as of that date, for that sum at three months. They accepted the bill, and when they did so Lascaridi told them that the policy would be ready in a day or two. This bill was paid at maturity. In the course of a few days afterwards a policy in the usual form of the company was filled up from the slip, and was dated the 1st of May, 1861.

The custom, as between insurance companies and insurance brokers, is for the companies to give credit to the brokers for the premiums, debiting them in account with the amount of such premiums, and when insurances are effected (as this was) for cash, or on cash account, all premiums for insurances effected during each month are payable on the 8th of the succeeding month. Just before the expiration of this credit a debit note is sent to the broker, with a statement of the amount of the premiums due, less a discount and a brokerage at 15 per cent. On the 8th of June a debit note was sent from the respondent's office to that of Lascaridi. On its being presented, Lascaridi's clerk said that no premium was due, and upon a second messenger being sent with the policy, which was expressed to be duly "signed, sealed, and delivered," and the debit note, the clerk repeated the statement, and said that the policy ought not to have gone forward. In the course of the day one of the clerks of Lascaridi called at the office of the company, and said that the policy had been put forward in error, and requested that it should be cancelled. A memorandum of cancellation was thereupon endorsed on the policy in these terms: "Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto." This memorandum was signed by two directors, witnessed, and registered in the regular way. The debit against Lascaridi for the premium was cancelled, but he was charged with the stamp, and the policy was handed to his clerk, with the memorandum of cancellation thereon, that he might, if he could, obtain from the stamp office a return of the stamp duty. On the morning of the 2d of September, 1861, Lascaridi's clerk called at the office of the company with the policy, said that the cancellation had been made by mistake, and wished the policy to be reinstated. He was informed that if the ship was safe, and not in the Baltic, there would be no objection, and he was requested to call again for an answer. At twenty minutes past eight o'clock on the morning of that day intelligence, by telegram, had been received at Lloyd's stating that the Leonidas was stranded on the Nervo, but this intelligence was not known to the respondent till three o'clock in the afternoon of that day. The reinstatement of the policy was then refused. It was admitted that the appellants had not, in fact, authorized the cancellation of the policy, nor did they ever receive back from Lascaridi any part of the premium, or any credit for the same.

The Lord Chief Justice, on these facts, directed a verdict for the defendant, but reserved leave to the plaintiffs to move to enter a verdict for them if the court should be of opinion that the policy was binding on the company, and had been cancelled without authority. A rule to that effect having been obtained, it was, after argument, dis-

charged, and this decision was confirmed on appeal to the Exchequer Chamber. The present appeal was then brought.

The judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Willes, Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Baron Pigott, and Mr. Justice Smith, attended.

Sir *George Honyman*, Q. C., and Mr. *Watkin Williams*, for the appellants.—The judgment in the court below was, that there never was a complete and binding contract between these parties. That proposition cannot be sustained. The policy was treated, except by Lord Chief Baron Pollock, as a common law deed, and it was supposed to require actual delivery to make it effectual. Formal delivery to the appellants, or even to a particular person on their behalf, is not essential for its validity: Comyn's Digest, *Fait.* A. 2; Rolle's Abridgment, *Fait.* J. 1. In Exton *v.* Scott, 6 Sim. 31, the grantor of a mortgage for years retained the deed in his own possession, and it was only discovered among his papers after his death, yet it was held not to be an escrow, but a deed, and took effect from its execution, and was good against his creditors. In Hall *v.* Palmer, 13 L. J. N. S. Ch. 352, a bond executed for the benefit of a woman with whom the grantor had cohabited, though retained in the hands of the testator's solicitor, and quite unknown to her till his death, was declared by Vice-Chancellor Wigram to be valid for her benefit. So in Fletcher *v.* Fletcher, 14 L. J. N. S. Ch. 66, where a man had executed a deed in favour of his illegitimate son, though unknown to the son, and the deed was kept in the grantor's possession, and not discovered until after his death, it was held to entitle the son to sue his estate for the amount. Doe d. Richards *v.* Lewis, 11 C. B. 1035 (E. C. L. R. vol. 73), is to the same effect; and in Kidner *v.* Keith, 15 C. B. N. S. 35 (E. C. L. R. vol. 109), a deed which, by arrangement, was to be executed in duplicate, was executed by the grantee, but not attested, and was sent in that state to the solicitor of the grantors to procure their execution, and they accordingly signed and delivered it; this was held to be sufficient, and the whole estate passed, the arrangement not rendering the deed a mere escrow till the duplicates should have been interchanged. In the case of a corporation, the act of putting the common seal to the deed is equivalent to the delivery. The policy here was treated by the parties themselves as having been duly delivered. It professes to have been "signed, sealed, and delivered" in the presence of the resident secretary, by two directors of the company, who declare themselves to have acted in accordance with the provisions of the deed of settlement of the company. Nothing more was required to make it a perfect and binding instrument. The retention of the policy by the officer of the insuring company, after it had been fully executed, would not prevent it from being complete. Doe d. Garnons *v.* Knight, 5 B. & C. 671 (E. C. L. R. vol. 11), is not distinguishable from the present. That case established that the execution of the deed and the formal act of delivery, by putting the hand on the seal, and saying, "I deliver this as my act and deed," made it binding as such, although the grantor, in fact, retained it in his custody, and did not deliver it to the party who was to take, or to any one for his use.

As to the liability of the broker, it is clear that if he makes himself liable for the premiums, money had and received can be maintained

on the policy, although in fact the premiums have not been paid at the time of the loss: Power *v.* Butcher, 10 B. & C. 329 (E. C. L. R. vol. 21); Arnould on Marine Insurance, vol. i. p. 105. If otherwise, it would follow that, should the ship be lost between the day of the execution of the policy and that for the payment of the premium, there would be no insurance, a proposition which could never be admitted.

The formal handing over of the policy of insurance is not necessary, for a policy is not like a bill of exchange, which may be revoked at any time before it is delivered; besides which, as Lord Campbell observed in Humfrey *v.* Dale, 7 E. & B. 278 (E. C. L. R. vol. 90), these matters must be looked at not solely according to the habits of lawyers, but with reference also to the usages and concerns of trade. Here all was done according to those usages, and it cannot be necessary to the validity of a policy of insurance that it should be obtained by the assured the moment the slip is signed. As soon as the slip was signed here the contract was complete, and the slip was in truth an agreement between the plaintiffs and the respondent, and not between the broker and the respondent.

Then, as to the question whether, if the policy was completed, the broker had not, so far as the respondent was concerned, authority to cancel it, and whether he had actually cancelled it. The plaintiffs had never authorized the cancellation; that was admitted in the special case. The clerk had no right, without their authority, to cancel it. Lascaridi had never given him any authority to do so; and Lascaridi himself not having received authority from the plaintiffs to cancel the policy, possessed no power to give him any. The person who is authorized to effect a policy does not thereby acquire authority to cancel it. The case states that the course with insurance companies is for the broker to prepare for each a slip, and the policy is afterwards filled up from that slip by the officers of the company, and is kept by the company until sent for by the assured or his broker. That very usage assumes that the policy may continue with the insuring company, but yet the contract will be complete. The mere keeping possession of the policy, even if it had still remained in the possession of the company, which it did not, would, therefore, have amounted to nothing; but, in fact, the actual possession remained with the broker, who must be treated as having held it as the agent of his principals. The general authority of a broker is stated in Story on Agency, s. 58, where it is shown (s. 103, 109), that though the broker, if the policy remains in his hands, may have, incidentally, authority to receive payment on a loss, he will not have authority to receive payment except in money. It is clear, therefore, that his authority is restricted in its nature. The policy here was completely effected, and what was afterwards done was null and void. The contract was complete when the slip was signed. The respondent thereby undertook the risk. [LORD CRANWORTH.—If the respondent had agreed to execute a policy, but had not executed it, could there have been an action for not doing so?] There might have been but for the stamp laws; they would prevent the remedy on such a contract, for the slip is not stamped, and so there would not have been sufficient legal evidence of it. [LORD CRANWORTH.—Was there not here a cancellation

endorsed on the policy before there was anything which amounted to a delivery of it by the parties to be made liable on it?] That depends on the view which the House may take of the facts of the case, and of their legal effect. The plaintiffs submit that there was here a complete delivery—that everything was really completed on the 1st of May, there were no terms to be considered, or added, or rejected, the execution of the policy and its delivery were perfect, and there had been nothing since which could impeach the validity of the contract: Ridgway *v.* Wharton, 6 H. L. C. 238, where Fowle *v.* Freeman, 9 Ves. 351, was adopted.

Mr. *Bovill*, Q. C., and Mr. *Archibald*, for the Defendant.—There was no policy here under the hands and seals of the company at the time of the loss. The declaration alleged the existence of a policy of insurance, purporting thereby to bind the company to certain things. There was nothing to sustain that allegation. Payment of the premiums was to be made by the plaintiffs through their agent, Lascaridi. The bill to make that payment was drawn in May, it had four months to run, and the date at which it was to become payable was actually subsequent to the date at which the ship was lost, and was long subsequent to the time at which the policy had been repudiated. The respondent never received any payment—the broker was, indeed, at one time debited to him in the books of the company, but that was nothing without the broker's assent; and so far from giving that assent, he denied all liability to pay the premium, and stated that the policy ought not to have gone forward. That occurred on the 8th of June; and as the underwriter always looks to the broker, the policy then came to an end. A memorandum of cancellation was made on the policy, and though the policy was left with the broker, it was left not as a delivery of it, as a policy, to him, as the broker for the assured, but merely to enable him to get a return of the stamp duty. This, so far from being an acknowledgment of liability, was a distinct declaration that no liability existed. The broker was the avowed agent of the plaintiffs, and they were bound by his acts. Nothing farther occurred till the vessel was lost. The defendant's company was not a corporation, but even if it had been, that would not have made the affixing of the seal to the policy binding on the company, unless that act had been done with a distinct intent to that effect: The Derby Canal Company *v.* Wilmot, 9 East 360. Nothing was done here which would bring the case within Doe d. Garnons *v.* Knight, 5 B. & C. 671 (E. C. L. R. vol. 11), where there had been a formal affixing of the seal, and a formal delivery of the document as the deed of the party. As to the delivery of a deed, it is said in the Touchstone, Ch. 4, p. 58:—"The delivery of a deed as an escrow is said to be where one doth make and seal a deed and deliver it unto a stranger until certain conditions be performed, and then to be delivered to him to whom the deed is made to take effect as his deed." Here it was only proposed to be delivered, and on that proposal it was repudiated. In truth, it never was delivered, and has never been in the possession of the appellants as a deed accepted by them. That acceptance was necessary to make it binding on the insurers, for the appellants were at liberty, up to the last moment, to object to the terms of the deed and to repudiate it. In Thompson *v.*

Leach, 2 Ventr. 198,(a) three out of four Judges were of opinion, against Ventris, that where there had been a surrender, though formally executed by some parties, if not agreed to by the surrenderee it did not operate as to him. Viner, Abr. *Faits*, K. pl. 12, is to the same effect; and in Townson *v.* Tickell, 3 B. & A. 31 (E. C. L. R. vol. 5), a devisee in fee was allowed to disclaim by deed without matter of record. Here the policy was never intended to be absolute till accepted by the other party, and by him it was repudiated and rejected.

The writing of the terms on the slip was not all that was necessary to constitute the contract. The premium was to be paid, and the policy was to be accepted. Neither of these things was done. Under such circumstances, the analogy to a bill of exchange is good, and the consideration not being paid, and the instrument not being delivered, no liability can possibly arise upon it. So in the case of an arbitration. The appointment of an arbitrator is not all that is necessary to bind the parties. It cannot, therefore, be argued that the signing and sealing of the policy rendered the policy completely binding on all parties. The acceptance of it would have made it binding—that acceptance was refused. The terms of the proposed contract were not adopted by the appellants, and they, not having accepted it, cannot now claim the advantage of it.

Sir *G. Honyman*, in reply.—Payment in account is, in these matters, according to the practice in London in such cases, equivalent to actual payment. The broker here did not refuse the policy by the authority of the plaintiffs, and his refusal without their authority had no effect. It was executed completely as a policy, and being so, delivery and acceptance of it were not necessary to complete its validity.

The following question was put to the Judges: "Whether, on the facts stated in the special case, the Victoria Fire and Marine Insurance Company was, when the ship Leonidas was lost, liable as insurer to the plaintiffs on the policy, or alleged policy, in the pleadings mentioned? It is to be assumed that the ship Leonidas was totally lost on the 1st of September, 1861."

May 8, 1867. Mr. Justice Smith.—My Lords,—I answer the question of your Lordships in the negative, on the ground that there never was, as it seems to me, a complete and available contract of insurance.

I assume it to be clear that the slip does not create a valid contract of insurance, and that it is only of avail as a proposal, or an order for a complete contract or policy of insurance. I apprehend it to be equally clear that the contract is not complete until the policy is executed, and delivered to and accepted by the assured, or some agent for him. This policy, although executed, was not in fact delivered out of the office of the respondent, either to the assured or to his broker, Lascaridi, who had ordered it, and whilst it lay in the office the intended insurance was, by the broker, put an end to, on the ground that it had been put forward in mistake. I assume, in favour of the appellants, that if the contract of insurance had been complete, Lascaridi had no authority to rescind the contract; but I assume also, in favour of the

(a) This judgment was affirmed in the King's Bench, 3 Mod. 296, but is said (2 Ventr. 208) to have been reversed in the House of Lords.

respondent, that, whilst it was incomplete, Lascaridi had authority to intercept its completion.

The whole case, therefore, is reduced to the question, which is mainly one of fact, whether, after the policy was executed, and before it came to the hands of the assured or his broker, the contract was perfected.

The appellants' case, on this cardinal point, wholly rests on the assumption that Lascaridi had made the officers of the company his agents to accept the delivery of the policy on his behalf. I think this is an assumption which is not warranted by the facts of the case. It arises from the very nature of the transaction that the person intending to insure, or his broker (when he acts through a broker), has a right to see the terms of the policy, and to object to them, if he thinks fit. This right may, of course, be delegated by the person intending to insure, and, I will assume, by his broker also; but it seems to me that clear evidence of such delegation is necessary, and the person intending to insure cannot, I think, with reason, be presumed to have delegated it to the insurers, from the fact that the policy was left in the office of the company, and not sent for; and yet such a presumption must be made if the argument for the appellants is to prevail. The right to object to the terms of the instrument, which may obviously be of the utmost importance, would, if this presumption is made, be gone as soon as the directors have executed the policy and handed it to their own clerks.

In the result, I think that the assumption on which the appellants' case rests is not warranted by the evidence; and I confess it seems to me that consequences full of real danger to the interests of persons intending to insure would follow from a rule founded on such an assumption. I agree with my learned brothers, who think that it is better to adhere to plain inferences of fact, than to attempt to remedy the inconveniences of a negligent mode of doing business by making the facts bend to the exigencies of the negligence.

Mr. BARON PIGOTT.—My Lords,—In answer to your Lordships' question, viz., "Whether, on the facts stated in the special case, the Victoria Fire and Marine Insurance Company was, when the ship Leonidas was lost, on the 1st of September, 1861, liable as insurer to the plaintiffs on the alleged policy in the pleadings mentioned," I answer that, in my opinion, the company was so liable.

The facts are very fully and accurately set forth in the judgment delivered by Mr. Justice Blackburn, in which judgment I entirely agree. It is unnecessary for me to do more than refer to the more prominent ones in stating the grounds of my opinion.

That opinion is based upon two considerations. First, I think there was a perfect and binding contract of insurance between the parties, dated on the 1st of May; and, secondly, that it was never cancelled or made void as between the appellants and the respondent.

The whole difference between the parties has obviously arisen from the fraudulent conduct of Lascaridi, the plaintiffs' broker; but it is equally clear, I think, that they are not to be held responsible for, nor ought their rights to be affected by, it. The authority with which Lascaridi was invested by the plaintiffs was that of a broker employed to effect an insurance in the ordinary manner, with this additional cir-

cumstance only, that after he had bespoken the policy, and before it was filled up from the slip, he had express authority to procure an alteration in the terms of insurance. To that alteration the defendant acceded, and thereupon a second slip was initialed by him for the insurance in question (the former slip being destroyed).

The case states what is the course of proceeding where, as in this case, insurance companies become the insurers. It is, that "a separate slip is prepared by the broker of the assured, and the policy is afterwards prepared from it by the company, and *is kept by them until sent for* by the assured or his broker." A separate slip was in fact so prepared for this policy, and was left by Lascaridi at the defendant's office, in order that a policy might be made out in the usual course by the defendant. Then, with regard to the premiums, it is the custom for insurance companies to give credit to the brokers for them, and to debit them in account. This was done in the books of defendant on the 1st of May, the day of signing the slip for this policy. On the same day Lascaridi sent to the plaintiffs (his principals) an account in which he debited them with the premium and duty, and he also drew upon them at the same time for the amount. This draft was accepted by plaintiffs, and was paid at maturity. When they accepted this bill they were told by Lascaridi that the policy would be ready in a day or two. In a few days afterwards, a policy in the form usually adopted by the defendant's company was filled up from the last slip, and was duly executed by two directors of the company.

It bears date on the 1st of May; it purports to have been signed, sealed, and delivered in the presence of a witness; it was therefore in form complete. In that state it continued in the custody of the defendant until the 8th of June, when the defendant sent a debit note for the premium and stamp to Lascaridi's office. At the instance of Lascaridi the defendant was induced to cancel the policy, on the representation that it had been "put forward in error." This (as we now know) was a false statement on the part of Lascaridi. It is on the circumstance of the policy remaining in the hands of the defendant, as above stated, that the question depends, whether the transaction constituted a complete contract in law and fact, or not. I am of opinion that it was complete.

What inference might have been drawn from the fact of its so remaining if there were no explanation about it, it is unnecessary to consider; for we have the reason given; and that reason is, not that it awaited anything to be done upon it by the defendant, or to be assented to by the plaintiffs, but that it was there only till sent for by the assured or his broker, or, in other words, that it remained there according to the trade usage or by tacit understanding. This reason necessarily implies that in all other respects it was a completed transaction. But farther, it is plain that the formal assent of the plaintiffs was not wanting to any of the terms of the policy, for that was evidently intended to be, and accordingly was, made out in the defendant's usual form, filled up with the particulars from the slip. But farther, the defendant acted upon the policy as a perfected transaction, when, on the 8th of June, he demanded payment of the premium for which he had given credit to the broker. In the face of this demand, I confess it seems startling that the defendant can be heard to say that

there was no complete contract subsisting at that period. It was in form complete, and was shown, by the conduct of all the parties to it, to be believed and intended by them all (apart from Lascaridi's fraud) to be also completely in operation.

It seems, therefore, to be reduced to this, viz.: Was it essential that the deed should be given out of the defendant's possession in order to its perfect delivery as an operative instrument? I know of no such necessity in law or good sense.

Sheppard, in his Touchstone, writing of the requisites of a good deed, treats, fifthly, of delivery as a matter of fact to be tried by jurors,(*a*) and by the whole context shows that it is a question of intention. He afterwards(*b*) says, that "Delivery is either actual, *i. e.*, by doing something and saying nothing, or else verbal, *i. e.*, by saying something and doing nothing, or it may be by both; and either of these may make a good delivery and a perfect deed."

Doe d. Garnons *v.* Knight, 5 B. & C. 692 (E. C. L. R. vol. 11), is an authority most satisfactory on this subject, and it is only necessary to quote one passage from the judgment of the Court as delivered by Mr. Justice Bayley. He says: "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential." This passage seems to be exactly applicable to the facts of the present case, with this addition, that there is here not only nothing to qualify the delivery, but, as above suggested, much to show that the defendant did intend it to be unqualified, and a deed in full operation.

The only remaining question which could arise, viz., whether the plaintiffs were bound by the fraudulent conduct of Lascaridi in procuring the cancellation of the policy, was not much urged at your Lordships' bar, although it had been relied upon at Nisi Prius and in the Court of Common Pleas. It is a proposition clearly not sustainable. The act was without authority, express or implied; and it is enough to say upon it that Lascaridi was the broker employed to procure a policy, and from that employment it is impossible to imply an authority to cancel it. Then he certainly had no express authority, as is admitted in the special case.

I therefore answer your Lordships' question in favour of the plaintiffs, and in the affirmative.

Mr. JUSTICE MELLOR.—My Lords, I answer the question put by your Lordships to the Judges in the affirmative. I carefully attended to the arguments urged by the learned counsel who appeared for the parties in this case at the bar of your Lordships' House, but I confess that the observations then addressed to your Lordships did not affect the conclusion at which I arrived when the case was heard by the Judges in the Court of Exchequer Chamber. I do not venture to repeat the observations which I then made, but I humbly refer your Lordships to the judgment which was then read for me by my brother Blackburn.

My judgment depends upon the facts which I consider to be admit-

(*a*) Vol. I. c. 4, p. 54. (*b*) Ibid. p. 57.

ted by the case, viz., that the policy in question was prepared by the defendant in conformity with the instructions of the plaintiffs, given through their broker, Lascaridi; that by the mode of dealing between the plaintiffs' broker and the defendant, the amount of the premium and the stamp must, as against the defendant, be treated as paid; that the policy was duly executed and delivered as a deed by the defendant, who did everything that he intended to do to complete such execution and delivery, and that it was merely kept in his custody until called for by the assured or their broker. The plaintiffs, as I think, were bound by it, because it was prepared in conformity with their instructions. The defendant was bound by it, because he had accepted the terms and mode of payment of the premium and stamp, and acted upon the instructions of the plaintiffs, and had done everything which he intended to do by way of execution and delivery of the policy as a deed, and retained it only for safe custody until sent for by the assured in the ordinary course of business.

Mr. JUSTICE BLACKBURN.—I answer your Lordships' question in the affirmative. Two questions are involved in your Lordships' question. First, whether the policy before the 8th of June was so executed as to bind the defendant's company to the plaintiffs; second, whether the transaction between the defendant's company and Lascaridi (the plaintiffs' broker) operated so as to release the defendant from the obligation he had contracted to the plaintiffs, supposing the policy to have been so executed.

I have already, in the judgment I delivered in the Court below, expressed the reasons for my opinion at length.(*a*) And as I have not been induced, by anything I have heard at your Lordships' bar, to alter the opinion I then expressed, I think it better to refer your Lordships to that printed opinion than to repeat the opinion I there gave.

I have had an opportunity of perusing the opinions of my brothers Willes and Smith, and, if I understand them rightly, they agree with me in thinking that if the policy was binding before the 8th of June, what occurred subsequently would not discharge the company. I shall, therefore, say nothing more on that branch of the question.

As to the other branch, I should wish to call your Lordships' attention to what I think are the real points in controversy. They are, I think, two; one of fact, the other of law.

The question of fact is, I think, this: Was the policy really in fact intended by both sides to be finally executed and binding from the time when the directors of the defendant's company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not.

If I thought that the parties did not in fact intend it to be then finally binding, I do not think there would be any magic in the law to make it binding contrary to their intention; but I submit to your Lordships that the statements in the case as to what is stated to be "always" the practice, and the statements there as to what was done in this particular case, show that the intention of both parties was, that the policy, when drawn up by the company in conformity with

(*a*) 13 C. B. N. S. 451 (E. C. L. R. vol. 106).

the instructions in the advice slip sent in by the broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that the policy from that time should be binding, and should lie in the company's office as the property of the assured till sent for by them, and then be handed over to their messenger.

It seems that some of the Judges take a different view of the fact, and think it really was intended that the policy should not be finally binding till something more was done by the assured. Your Lordships will decide which is the true view of the facts.

Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a bailee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: "I deliver this as my deed;" but any other words or acts that sufficiently show that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In Butler and Baker's Case, 3 Co. Rep. 26, it is said: "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., there B. may refuse it in pais, and thereby the obligation will lose its force." I cannot perceive how it can be said that the delivery of the policy to the clerks of the defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the defendant to the use of the assured. There is neither authority nor principle for qualifying the statement in Butler and Baker's Case, by saying that C. must not be a servant of A., though, of course, that is very material in determining the question whether it was "delivered to C. to B.'s use," which I consider it to be, in other words, whether it was shown that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B. In the present case, the assured could not have refused the deed in pais, for it was drawn up in strict pursuance of the authority given by them in the slip set out in the case; and I think a prior authority is at least as good as a subsequent assent. That question, however, does not arise, as they did not refuse it in pais.

No authority, I think, has been cited which supports the position that there is a technical necessity for some one who is agent of the assured taking corporal possession of a policy under seal before it can be binding, though intended by both parties to be so. I think it

would be very inconvenient, and would work great injustice, if such were the law. I must leave it to your Lordships to determine whether it is so or not.

Mr. JUSTICE WILLES.—My Lords, I answer the question in the negative, that upon the facts stated in the special case, the respondent (who represents the Victoria Fire and Marine Insurance Company), was not, when the ship Leonidas was lost, liable as insurer to the plaintiffs on the policy, or alleged policy, in the pleadings mentioned.

Assuming, as upon the statement it must be assumed, that the broker had no authority to revoke this policy, if once completed, so as to be the contract of and binding upon both parties, the question is whether it ever was so completed?

In dealing with this question as a practical one, it must be borne in mind that albeit consent, not corporal possession, makes the contract, yet the plain duty of the broker is not merely to bespeak, but to procure the policy, and to procure it upon his own credit. A loose way of business upon trust cannot abrogate any part of that duty, or make up for the consequence of neglecting it; and, indeed, taking the practice alleged to prevail as a whole, it is for the most part, viz., as to the insurances effected at Lloyd's, consistent with the duty of the broker to effect the policy in such a manner that his employer, or he, on behalf of his employer, should have the policy.

In the case of insurances at Lloyd's, no difficulty can arise, for the broker sends round the policy, and procures the signatures. When the policy is effected with a company, therefore, if analogy is to prevail, the broker ought to call for the policy. A careless practice, not stated to have grown into a known usage of trade, may exist of not asking for the policy, but if this be so, it is pure negligence. Nor can it be doubted that the employer in such a case, equally as in that of insurance at Lloyd's, is entitled to have the policy in his broker's hands. Nor could the broker, in case of any damage arising, for want of a policy, or of a proper policy, through his default in not asking for it, or looking to see that it was in order, resist an action such as was brought by the employers in Turpin *v.* Bilton, 5 M. & G. 455 (E. C. L. R. vol. 44).

The statutes requiring contracts of marine insurance to be in writing, and stamped (35 Geo. 3, c. 63, s. 11; 54 Geo. 3, c. 144, ss. 3, 4, 5), annul contracts not so framed, consequently, a marine policy, or contract for a marine policy, to be valid, must be in writing, which, by the assent of both parties, shall represent the contract between them. But for the decided cases, it might have been supposed that upon the slip being completed, there was a contract on the part of the assurers to prepare and hand over a policy according to the slip, and that although, because of the statutes, no action could be maintained as upon a policy of insurance, yet an action might be maintained for not preparing a policy. And causes have even been tried, without objection, upon the notion that the insurance is complete from the date of the slip.

But the law, as settled by the decisions upon the construction of the statutes referred to, is, that as there can be no valid insurance, or contract for an insurance, unless by writing with the statutory requisites, the slip by itself has no binding force. Thus, it has been held,

that, notwithstanding the slip, the proposed assured, upon the one hand, can insist upon being off, and can retract his order, and refuse to accept the policy: Warwick *v.* Slade, 3 Camp. 127, where the employer retracted the broker's authority after the slip was signed, though before the policy was completed; and, on the other hand, that the slip imposes no liability upon the proposed insurer, and there is no remedy against him until the policy is complete: Parry *v.* The Great Ship Company, 4 B. & S. 556 (E. C. L. R. vol. 116).

It follows that the slip, though complete, is no contract, nor even part of a contract of insurance, but a mere proposal that a policy of insurance shall be entered into *in futuro*, and, in case of insurance with a company, a request that the policy shall be prepared at the office. Does it follow, that when a policy is prepared in alleged compliance with the request, it shall be, without more, the contract of both the parties? That cannot be the rule, because it must be open to the customer, or to his broker, when the negotiation takes place through a broker, to object (and especially in the case of company policies, which do not always follow Lloyd's form), that the policy is wrong. In case of war, or a dangerous voyage, or, indeed, any case with a special provision, disputes may easily arise. In this very case a question might have been raised upon the omission of the running-down clause, which has been so commonly added in the margin since Devaux *v.* Salvador, 4 Ad. & E. 520 (E. C. L. R. vol. 31); and see also Taylor *v.* Dewar, 5 B. & S. 58.

It is thus obvious that there must be power to object or refuse assent to the policy when prepared by the company; and, inasmuch as such objection or refusal touches the question, policy or no policy, it lies within the scope of the broker's authority. He may give a bad reason for his refusal, as the broker in the principal case is said to have done; but the badness of the reason assigned cannot take away from the effect of the act done, which, according to the maxim, must depend upon the power he had to do it, not upon the soundness of the reason he gave for doing it.

By way of removing this difficulty, various suggestions have been made in argument. One was that the case is analogous to a conveyance of property, where assent is presumed until disclaimer. I am not aware, however, that this doctrine of presumed assent has ever been applied to the case of a mercantile contract, with something to be done on both sides, such as to insure upon terms which may or may not be correctly expressed, in consideration of being paid, or allowed to debit in account, a premium which may or may not be commensurate to the risk.

In the case of a simple benefit conferred, to be taken as it is, or not at all, like a bond or a release, there might be room for such a presumption, though it is difficult even there to recognise a complete contract before assent. But the presumption is out of place as applied to a contract with mutual obligations, which must be matter of bargain, and must be incomplete so long as either mind may dissent.

Indeed, the suggested analogy to conveyances of visible property, if it held good, would not help the plaintiffs, but rather tend to illustrate the necessity of subsequent assent. Thus, if B. order of a watchmaker a watch of the same make and materials as that of A., with

B.'s name upon it, and the watchmaker makes it accordingly, intending it for B., and puts B.'s name upon it, so that it is as much as it can be the very watch bargained for, yet, without a new assent on B.'s part, it does not vest in him; the watchmaker cannot make B. take to it, nor B. compel its delivery. See the argument in Atkinson *v.* Bell, 8 B. & C. 277 (E. C. L. R. vol. 15).

And, in like manner, as to a contract to be prepared *in futuro*, if goods are bought, to be paid for by the buyer's promissory note or check, payable to the seller or order, and the goods are delivered and accepted, and the buyer makes the note or check, and leaves it with his servant, to be handed to the seller when he calls for it, that transaction is not enough to vest the note or check in the seller, and the buyer may, without more, retake the note or check from his servant, and put it into the fire.

It is clear, therefore, that the doctrine of presumed assent to a conveyance will not help, and that the mere previous request (even though binding as part of a contract), that a contract, which, to be valid, must be in writing, shall be prepared by one of the parties, proposing to contract, for the other, has not the effect of vesting a right in any contract in writing if and when so prepared, and much less can a previous colloquy, not binding as part of a contract, have that effect.

As another way of getting out of the difficulty, it was suggested to assume that the insurance company, or servants of the company, were made agents of the employers of the broker, for the purpose of assenting to the policy on their part. That would, however, be simply assuming the thing that is not, for the sake of shutting out an unpleasant consequence of the thing that is. To hold an auctioneer, or common broker, or other independent go-between, to be authorized to complete the contract for both buyer and seller, is but a necessary conclusion of fact from his being their common agent. To reason thus as to a clerk or servant of one of the parties, employed by him in a dependent capacity to attend to his business, involves a contradiction, and has no foundation of fact.

These sources of light thus failing, let the transaction itself be examined with attention. It has been observed that the slip amounts only to a proposal that a policy shall be prepared upon certain terms. Those terms, so far as they are to bind the insurer, commonly include some known uniform ones, as to which there can be no question, but also others applying to the particular transaction, sometimes obscurely worded, sometimes imperfectly understood, and as to which disputes may arise. This consideration alone keeps the policy *in fieri* until objection is waived. On the other hand, the terms, so far as they are to bind the assured, include, besides the implied warranties, payment of premium, either in cash, or by being credited in account.

If, then, the plaintiffs had ordered the policy without the intervention of a broker or his obtaining credit for himself, they could not have insisted upon receiving it without paying the company in cash. Had the directors offered them the policy, and had they refused to pay for it, they might have treated the negotiation as at an end, and cancelled the proposed policy. Had the loss happened before the plaintiffs called for the policy and paid the premium, the same result

would follow, though the insurers might not choose to take advantage of a short delay. So much for a cash transaction.

If the directors agreed to insure against the plaintiffs' promissory note at a month, like considerations would arise. Had they in such case prepared the policy, and left it with their clerk, and the plaintiffs had drawn the note, and left it with their clerk, it is difficult to see why, without more, the policy should vest in the plaintiffs and not the note in the company, which, without more, it clearly would not.

In the principal case the directors were content to take the broker's credit instead of cash; that is to say, instead of stipulating for cash down they stipulated for the broker's allowing them to charge him in account with the premium; and this the broker, refusing to take to the policy, refused to allow them effectually to do, and so put the directors in the same position as if they had stipulated for cash, and cash had not been paid.

Some confusion has arisen from an attempt to deal with this case as if it had been that of an agent of a named principal, undoing, without authority, a contract which he had completely effected in pursuance of his authority. The case ought not to be so regarded. The broker was an agent to procure a policy in consideration of a payment to be made to him by his employers, with whom, directly, the defendant had nothing to do, he taking care that the policy was effected upon the given terms and upon his credit, the defendant looking to him for payment, and having no claim against his employers. Inasmuch, then, as the broker has to exercise a judgment upon the sufficiency of the policy, it was necessarily within the scope of his authority to reject that prepared as not being one, or the one ordered. When he does so properly, his employer gets the benefit; when he does so improperly his employer has his remedy by action against the broker. But the defendant, who dealt with the broker only, and stipulated for his taking to and being debited for such a policy, must, upon his rejecting it, and refusing to be debited in account with the premium thereupon, have an equal right to consider the negotiation at an end, and to cancel the proposed policy, as if cash had been stipulated for and refused.

The transaction cannot properly be split up into parts. It stands upon the same footing as if, upon one and the same occasion, the broker had ordered the policy at the respondent's office, and whilst he waited for it the seals had been affixed to a form of policy in another room, and before he received or assented to the policy he had said, "Stay; I made a mistake. I decline to take up the policy, and you must not charge me in account with the premium." Whereupon the form was cancelled.

No subsequent protest by the principals that their agent ought to have acted otherwise can avail them. Their payment of the premium was not made to the insurers, but to their own ill conducted broker, and their remedy must be against him. The defendant has not received, but has been refused, the premium; and he was in no default, because he acted upon the refusal of the broker, to whom the whole business of effecting the policy was left.

The fallacy of the argument for the plaintiffs consists in separating the preparation of the policy from the rejection of it by the broker,

and thus splitting up into several contracts, one of which is alleged to be authorized and the other not, what in reality, though distinct events in point of time, constituted together but one negotiation, which, by reason of the misconduct of the plaintiffs' agent, was abortive.

The question is thus answered in the negative.

July 16. THE LORD CHANCELLOR (Lord CHELMSFORD).—My Lords, the difference of opinion which has prevailed amongst the learned Judges in this case must necessarily diminish the confidence which I feel in the judgment I have formed upon it, more especially as that judgment is not in accordance with the views of the majority of the Judges.

The question is one more of fact than of law; and therefore, in considering it, it will be necessary to refer to the facts contained in the special case.—[His Lordship stated them very fully.]

The usage with respect to premiums upon insurances effected by brokers is clearly explained by Lord Ellenborough in Jenkins *v.* Power, 6 M. & S. 282, and by Mr. Justice Bayley in Power *v.* Butcher, 10 B. & C. 329 (E. C. L. R. vol. 21). The latter learned Judge says, (Ibid. 339): "According to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter."

The questions which arise out of the facts of the case are:—1st. Whether there was a complete contract of insurance between the parties? and, 2d. If there was a complete contract, whether it was afterwards cancelled by the plaintiffs' authority?

Upon the first question we have no evidence of the fact of the execution of the policy, except that which arises upon the face of the instrument itself, and upon the facts stated in the special case that the policy (which must be taken to mean the executed policy) is kept by the company until sent for by the assured or his broker. The policy purports to be signed, sealed, and delivered by two of the directors of the company in the presence of Reginald Scaife resident secretary. This statement on the face of the policy that all acts were done to render the execution complete, which is acknowledged by the directors who executed it, must, I think, be taken to be conclusive against the company, that it was not only signed and sealed, but also delivered. We all know the formal mode of executing a deed by the words, "I deliver this as my act and deed"—a form which, no doubt, or something equivalent to it, was observed upon this occasion. The policy, most probably, was afterwards given to the secretary, to be kept till called for. Now, although the policy was thus retained by the officers of the company, when formal execution of it had taken place, they held it for the plaintiffs, whose property it became from that moment. It is a mistake to suppose, as some of the learned Judges have done, that the policy wanted its complete binding effect till it was delivered to and accepted by Lascaridi. The usage of insurance companies, to

keep the policy until sent for by the assured or his broker, is not for the purpose of completing the instrument by a delivery personally to the party or his agent, but merely as a matter of convenience. And as to Lascaridi's acquiescence and acceptance being necessary to complete the contract, I apprehend that there is no ground for such an opinion. He was the broker and agent to the plaintiffs, to effect an insurance upon their vessel upon certain terms dictated by them. He prepared the slip according to his directions. When the policy was executed, in exact conformity to his instructions, his duty was so far discharged; and without the authority of the plaintiffs he could not refuse to accept it. They had effected, through their agent, a complete binding contract, which they alone could have a right to abandon.

It is hardly necessary, after the preceding observations, to say anything upon the second question, as to the supposed cancellation of the policy. All the Judges seem to have thought that if the contract was binding, Lascaridi had no authority to cancel it. The company could not have been led from anything in the previous transaction respecting the same vessel, to suppose that Lascaridi was authorized to act beyond the ordinary scope of the authority of a broker. It is one thing to cancel a slip, which is merely the inception of a contract, and to change the terms of the proposal for an insurance; and an entirely different thing to release the underwriters from their liability upon a policy. It is quite clear that Lascaridi had no authority from the plaintiffs to relinquish on their behalf the benefit of a contract to which they were entitled, and that the company had no reason to suppose that he possessed any such authority.

I think that the judgment of the Exchequer Chamber was wrong and ought to be reversed, and that judgment should be entered for the plaintiffs.

Lord CRANWORTH.—My Lords, my noble and learned friend has gone so fully into the facts of this case, that I shall not farther advert to them, but shall assume that they are present to the minds of your Lordships.

There is one part of this case which seems to me to admit of no doubt. If the policy was so executed as to have become a complete instrument, binding on the respondent, and giving a good right of action to the assured in the event of a loss, I think it clear that he could not cancel it at the instance of Lascaridi. The insurers had a right to consider him as having authority to do all which a broker can do in discharge of his duty in effecting a policy, and they might safely settle with him in case of a loss, if that be the ordinary mercantile usage; but there is no suggestion that it is part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into.

The only semblance of plausibility in support of such an argument was, in this case, the fact that on a previous occasion he had an authority expressly delegated to him by the plaintiffs to cancel something—but that was an authority, not to cancel a policy, but to cancel a slip. They had originally proposed, through Lascaridi, to effect a policy on the Leonidas with the respondent, on terms materially differing from that ultimately acted on, and a slip had been signed, and

handed to the respondent for that purpose, five days before the signing of the slip on the 30th of April; but on that latter day, and before anything had been done, Lascaridi called on the respondent, at the instance of the appellants, expressing their desire to substitute the terms of insurance ultimately acted on, instead of those originally proposed. To this the respondent agreed, and the slip dated the 30th of April, 1861, was accordingly prepared, and left with the respondent as the groundwork of the policy to be prepared by the company. It was suggested that as the appellants had thus authorized Lascaridi to make this important change in the nature of the contract to be entered into, the respondent might reasonably suppose he had authority to sanction the cancellation of a policy already validly binding on the assurers. To this I cannot accede—as it is admitted that Lascaridi had not, in fact, any authority to cancel the policy of the 1st of May. If it was a binding instrument, his act cannot affect the appellants, unless it was done according to some ordinary course of business which would warrant it. I can see nothing whatever to warrant such an assumption. And, indeed, the point was not much insisted on. The point really argued was, that the circumstances are not such as to show that any absolute liability ever attached on the company. The policy, it is said, did not become a binding contract on the company until it had been taken from the office by the appellants or their broker, and been accepted by them as the terms by which they were to be bound.

There is no direct evidence as to what actually took place when the policy was, according to the practice (as stated in the language of the special case), filled up from the slip by the officers of the company; but as the policy purports to have been signed, sealed, and delivered by two directors of the company in the presence of the registrar, in pursuance of the powers and directions contained in the deed of settlement of the company, the fair inference is, that this was the course prescribed by the deed, and that that course had been duly followed.

But, as to the effect of what was so done, the parties differ. The appellants contend that by thus signing, sealing, and delivering the policy, the directors made it an instrument thenceforth binding on the company. On the other hand, the respondent contends, that until the policy was taken away by the assured, or his broker, it did not become binding on the company. This latter view is that which has been taken by the great majority of the learned Judges; and it is therefore not without some hesitation that I have arrived at a different conclusion, and that I concur with the opinions of the small majority of the Judges who heard the case when it was argued at your Lordships' bar. I am of opinion that from the moment when the directors, acting, as I infer they did, in pursuance of the powers and duties conferred and imposed on them by the deed of settlement, executed the policy, it became absolutely binding on the company; and that it was not necessary, in order to give it binding efficacy, that it should be taken away by the appellant or his broker.

I come to this conclusion on the following grounds:—In the first place, the efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not

affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived or the condition has been performed, the instrument is not a deed. It is a mere escrow.

If, therefore, the directors who executed this policy, delivered it only conditionally, *i. e.*, to take effect only when taken away by the appellants or their broker, then, as it was not so taken away, it never became operative. But I can discover nothing leading to the inference that there was any such condition attached to the delivery. The expression in the case that the policy is kept by the company until it is sent for by the assured or his broker, can only mean that this is the ordinary course of practice. But such a practice cannot, without more, have the effect of converting that which would otherwise be an absolute, into a conditional delivery; of converting delivery as a deed into delivery as an escrow. The practice referred to is, at least, as consistent with the hypothesis of delivery as a deed as of delivery as an escrow. A policy of this company can only be executed (as I presume) when certain of the directors and officers of the company are assembled; and this explains why it is executed in the absence of the party assured. The practice assumes the previous assent on the part of the assured to the policy to be executed. It is not the practice that the assured should call for or examine the policy before he takes it away, but that he should *send* for it, evidently treating it as an instrument complete before it is taken away from the office. If, when it has been sent to him, he should discover that it is not conformable with the slip, his only remedy would be a remedy in equity to get it corrected according to the real meaning of the parties.

I know of nothing intermediate between a deed and an escrow. If the policy, when signed, sealed, and delivered by the directors, does not thereby immediately become the deed of the company, I do not see when and how it afterwards acquires that character. The practice is, that it should be kept by the company till sent for by the assured or his broker; not till the assured has had an opportunity of examining it, so as to ascertain that it is conformable to the slip.

It can hardly be argued that after the assured has sent for and obtained possession of it, the company is not bound by it, even if it is not in conformity with the slip. Suppose the liability of the company, according to the slip, was to endure for a year, but that by the policy it is restricted to six months, the assured on receiving the policy and discovering the error might well object, and insist on having a different policy; but yet if a loss should happen within the six months, it surely cannot be doubted that the company would be liable on the policy actually executed. So if a loss should occur while the policy remains in the office, in consequence of the assured having carelessly forgotten to send for it. This can only be, because it had been completely executed, though never seen and approved by the

assured. And if executed, I am of opinion that it became complete when signed, sealed, and delivered. If the usage had been that it should, after being signed, sealed, and delivered, remain in the hands of the secretary till the assured or his broker had done some act signifying his approbation of it, that might have raised a question whether, until that approbation had been expressed, it was more than an escrow. But no such usage is stated. On the contrary, the thing sent for by the assured or his broker is, as I have already stated, clearly looked to as something complete before it is taken from the office, not as a document to be made perfect afterwards by some act of the assured.

On these grounds I have come to the conclusion, after much consideration, that the three learned judges who were the majority giving their opinions to your Lordships were right; and so, that judgment ought to be for the appellants.

Judgment reversed; and judgment given for the plaintiff.

Attorneys for the appellants: *Cotterill & Sons.*

Attorneys for the respondent: *Roy & Cartwright.*

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TO

THE PRINCIPAL MATTERS.

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ABSTRACT OF TITLE,—See AUCTION, 2.

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AGREEMENT.

Construction of.

1. *Condition precedent.*]—The declaration,—after reciting that certain persons intended to apply to parliament for leave to bring in a bill for making and maintaining water-works, and incorporating a company for the supply of water,—set out an agreement between the plaintiffs (an engineer and solicitors) and the defendants (contractors), whereby it was agreed that the defendants should be the contractors to do the proposed works, and should provide the parliamentary deposit, and that in the event of the intended act not being obtained, the defendants should pay a sum not exceeding 300*l.* towards the expenses in endeavouring to obtain the act; and that the plaintiffs should not make any charge for work done or money paid against the provisional directors of the intended company, or beyond the said 300*l.*, against the defendants. Plea, that the plaintiffs, having incurred costs to the amount of 300*l.* in endeavouring to obtain the act, refused to continue and ceased from continuing such endeavours, on the ground that no one would provide them with funds to pay the counsel's fees, whereupon it became necessary that the bill should be lost for want of further prosecution, or that the defendants should prosecute it; and that the defendants accordingly employed other solicitors for that purpose, and in so doing incurred costs to an amount greatly exceeding 300*l.*, but that the bill was thrown out. The plea concluded with a general averment that all things had happened to entitle the defendants to employ the last-mentioned solicitors, and to make the said payment a performance by the defendants of the agreement so far as related to the 300*l.*:—Held by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the plea was a good answer to the action,—the continuance by the plaintiffs of all reasonable endeavours to obtain the act being a condition precedent to their right to call upon the defendants for the 300*l.*, and the plea showing that they had failed to use such endeavours. *Leakey* v. *Lucas*, 491.

2. *Implied covenant.*]—By an agreement for the sale of the goodwill of a medical practice, it was stipulated that the purchaser should have delivered up to him possession of the house, and have sold to him the horse, drugs, bottles, and surgical instruments and furniture employed in the business, at the sum of 171*l.* 5*s.*: and the vendors agreed with the purchaser to pay rent and taxes up to a given day, and that they would not within ten years from the date of the agreement practise, &c., at or within ten miles of the place: and the purchaser agreed that he would, on condition of the premises, pay the vendors for and in respect of each of the successive years ending the 31st day of December, 1860, 1861, 1862, and 1863, if he should be living at the end of each respective year, one-fourth part of the

AGREEMENT.
Construction of (continued).
earnings and receipts in respect of the said practice, without any deduction for expenses,—provided the earnings and receipts in each year should amount to 300*l.* In an action upon this agreement, the breach alleged was that the defendant, since the making of the agreement, and during and before the expiration of the third of the said years, to wit, the year 1862, had by his own acts and defaults wholly disabled and incapacitated himself from further carrying on the said business and from getting or obtaining any further earnings or receipts therefrom, and had never since carried on the said business or obtained any further earnings or receipts therefrom:—Held, that it was an implied covenant in the agreement, that the purchaser would not during the four years by his wilful acts or default prevent the receipt of earnings; and consequently that the breach was well assigned. *M'Intyre* v. *Belcher*, 654.

AMENDMENT.
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APPRAISEMENT,—See RAILWAY COMPANY, 5.

APPROPRIATION,—See SALE OF GOODS.

ARBITRAMENT.
Conduct of the Reference.
It is a matter entirely in the discretion of an arbitrator, whether he will or will not postpone the reference, in order to give one of the parties an opportunity of bringing a material witness from abroad. And the court will not interfere unless the circumstances under which he refuses to do so are such as to amount to misconduct. *Ginder* v. *Curtis*, 723.
Award under the Lands Clauses Consolidation Act, 1845,—See RAILWAY COMPANY, 9–11.

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ATTORNEY.
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1. The court will not allow articles of clerkship to be enrolled nunc pro tunc, and the service under them to be reckoned as from their date, where there has been an omission to cause them to be stamped within the time required by law,—even though the Treasury has accepted the stamp-duty with a penalty,—unless it is shown that the omission has been the result of some unforeseen emergency, or of the failure of some just expectation. The mere disappointment of a vague hope, will not suffice. *Ex parte Jones*, 301.
Action against, for negligence.
2. An attorney retained to defend an action is not guilty of actionable negligence if he enters into a compromise without the consent of his client, provided he acts bonâ fide and with reasonable care and skill, and the compromise is for the benefit of the client, and is not made in defiance of his express prohibition. *Chown* v. *Parrott*, 74.
And see MALICIOUS ARREST.

AUCTION.
Employment of Puffers.
1. Upon a sale of goods by auction, where the highest bidder is to be the purchaser, the secret employment of a puffer on behalf of the vendor is a fraudulent act, and vitiates the transaction. *Green* v. *Baverstock*, 204.
Delivery of Abstract.
2. By the conditions of sale of leasehold property, it was provided, amongst other things, that an abstract of the title of the vendors should be delivered to the purchaser on the tenth day after the sale; and that, "if any requisition on or objection to the title of any lot be made, whether arising out of the abstract furnished or otherwise, which the vendors may be unable or unwilling to remove or comply with, it shall be in the option of the vendors, by notice in writing to be given to the purchaser, to rescind the contract,

AUCTION.
Delivery of Abstract (continued).
unless such purchaser shall, within ten days after such notice shall have been given, waive such objection or requisition; and, in case such purchaser shall not, within ten days after such notice shall have been given, waive such objection or requisition, the deposit money shall thereupon be returned to such purchaser, but without any interest, costs, or expenses." The abstract delivered showed the title to be in the vendors jointly with the executors of a deceased partner. The purchaser thereupon required that the executors should join in the conveyance. It was afterwards discovered that two years before the executors had released to the vendors all their interest in the property of the firm, and the purchaser was furnished with a further abstract of that deed. Conceiving that deed to be insufficiently stamped, the purchaser still required that the executors should be conveying parties. This they refused; and thereupon the vendors gave the purchaser notice, under the above condition, that they elected to rescind the contract, and offered to return the deposit-money. In an action against the vendors for not delivering a proper abstract,—the deposit having been paid into court,—Held, that the purchaser was entitled to recover for the breach of contract, but only, under the circumstances, to nominal damages. *Steer* v. *Crowley*, 337.

AVERAGE LOSS,—See SHIPPING, 1, 2.

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BANKRUPT.
Deed of Arrangement under 12 & 13 Vict. c. 106, s. 224.
1. *Exception of wearing apparel, &c.*]—A deed of arrangement under the 224th section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), is not rendered void by an exception out of the assignment to the trustees of "the *necessary* wearing apparel of the debtor, his wife, and family;" or of a leasehold house held by the debtor at a rack-rent, and recited to be of *no value*,—the deed containing a covenant by the debtor to assign it to the trustees when he should be required to do so. *Spitzer* v. *Chaffers*, 686.
2. *Provision for costs.*]—Neither is the deed avoided by a provision enabling the trustees to pay "all costs and expenses which they may have been or may be put to, or which the debtor has sustained in or about and also preparatory and preliminary to the preparing and engrossing of these presents, and procuring the execution of the same, or in or about the negotiations and preparations for this present arrangement, or any negotiations, preparations, or matters in reference to the winding up of the estate of the debtor, and also all costs, &c., attending the investigation which has already taken place, and any future or subsequent investigation, and the arrangement of the affairs of the debtor, and the obtaining the consent of the creditors thereto and to join in and execute these presents, and all disbursements incident thereto, and also all the costs, charges, and expenses of and attending the perusing and approving of these presents on behalf of the general body of creditors." *Ib.*
3. *Release.*]—Nor by the circumstance that the releasing parties are described to be "the parties hereto of the third part," viz. such of the creditors who have executed the deed,—the deed appearing to have been executed by the statutory number required to make it a deed binding upon non-assenting creditors. *Ib.*
Deed of Arrangement or Composition under 24 & 25 Vict. c. 134, s. 192.
4. A deed of composition, which purported to be made between the debtor and the several persons, creditors, whose names and seals were subscribed and affixed thereto, contained the following covenant,—"And each of them the said creditors parties hereto doth hereby for himself, his executors, &c., covenant with the said N. (the debtor), his executors, &c., to retire and deliver up to him and them, cancelled and discharged, *all* bills of exchange or promissory notes given to the said creditors or any or either of them before the date hereof, for any debt due to him or them from the said N., or for which the said N. is liable, and to hold him and them harmless against all costs, charges, damages, and expenses to which they or he may be put in consequence of or in default of the non-retirement of the same:"—Held, not a valid deed within the 192d section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134. *Ingleback* v. *Nichols*, 85.
5. A deed of composition which in terms excludes all creditors who do not execute within a given time, is not a valid deed within the 192d section of the Bankruptcy Act, 24 & 25 Vict. c. 134. *Copeman* v. *Hart*, 91.
6. A deed of composition which purports to be made between the debtor and such of his creditors as shall execute the same, and which either expressly or impliedly excludes from its benefits and provisions non-executing creditors, is not a valid deed within the 192d section of the Bankruptcy Act, 1861. *Ilderton* v. *Castrique*, 99.

BANKRUPT.

Deed of Arrangement or Composition under 24 & 25 Vict. c. 134, s. 102 (continued).

7. *Number and value.*]—In estimating the number and value of the assenting creditors to a deed under the 192d section of the Bankruptcy Act, 1861, secured as well as unsecured creditors are to be taken into the account. *King* v. *Randall*, 721.

8. *Certificate.*]—A certificate given under s. 198 of the Bankruptcy Act, 1861, of the filing of a deed under s. 192 which deed has been held to be void, affords no protection to bail who have undertaken to render the debtor in the Mayor's Court, London. *Ilderton* v. *Jewell*, 665.

Sale of "Book-debts" under 24 & 25 Vict. c. 134, s. 137.

9. "Book-debts" in the 24 & 25 Vict. c. 134, s. 137, are such debts accruing in the ordinary course of a man's trade as are usually entered in the trade-books. *Shipley* v. *Marshall*, 566.

10. A., who carried on the business of a saddler, and had also been in the habit of buying and selling copyrights of newspapers (having had seven or eight transactions of the kind within three years), became bankrupt. He afterwards purchased from the assignees, under the 137th section of the Bankruptcy Act, 1861, all the outstanding "*book-debts*" due to his estate. Prior to his bankruptcy he had by an agreement in writing contracted to sell to B. the copyright of a certain newspaper and the back numbers, the purchase-money to be paid by certain instalments, of which 227*l.* 10*s.* remained unpaid at the time of A.'s bankruptcy. The agreement contained a stipulation that the instalments should be secured by a mortgage of the copyright to A. No entry of this transaction appeared in A.'s ordinary trade-books; but it was entered in his "diary:"—Held, that this was a debt which passed by a sale by the assignees of the "book-debts" due to the bankrupt, under the 137th section. *Ib.*

BILL OF EXCHANGE.

Effect of Laches on the part of the Holder.

1. A. received from B., as collateral security for a debt, a bill drawn by C. upon D., and at maturity failed to present it:—Held, that A.'s laches made the bill equivalent to payment as between A. and B. *Peacock* v. *Pursell*, 728.

Stamp, where payable to "A. B. or order."

2. A check drawn payable to A. B. *or order*, on demand, is a bill of exchange liable only to the stamp-duty of 1*d.* imposed by the 16 & 17 Vict. c. 59,—the provisions of the 55 G. 3, c. 184, s. 13, and 21 & 22 Vict. c. 20, being applicable only to drafts payable to *bearer* on demand: consequently, the fact of such an instrument being post-dated does not render it invalid. *Whistler* v. *Forster*, 248.

Right of Endorsee.

3. One who receives a bill of exchange unendorsed (though for value) acquires no better title under it than the person from whom he receives it himself has. *Ib.*

4. Where, therefore, A. had fraudulently obtained a bill (or check *payable to order*) from B., and handed it to C. in satisfaction of a bonâ fide debt, but without endorsing it,—Held, that C. could not acquire a legal title to sue upon the instrument, by obtaining A.'s endorsement after he had received notice of the fraud. *Ib.*

BILL OF SALE.

Addition of the Assignor.

One who up to and at the time of the execution of a bill of sale has never been actually engaged in any trade or occupation, is properly described therein (or in the affidavit filed therewith) as a "gentleman." *Gray* v. *Jones*, 743.

BIRKENHEAD DOCKS,—See CROWN GRANT.

BOOK DEBTS,—See BANKRUPT, 9, 10.

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CONDITION PRECEDENT,—See AGREEMENT, 1.

CONDITIONS OF SALE,—See AUCTION, 2, 3.

CONTRACT.

Construction of.

1. The defendant received an order from a correspondent at Bremen to purchase for him bar-iron of a description known there as S. & H. crown iron. Upon inquiry, he found that the firm of Snowden & Hopkins, whose mark that was, had ceased to exist, and had been succeeded by a firm of Hopkins & Co. (the plaintiff): and he accordingly, through a broker, bought of the plaintiff sixty-seven tons of iron, which was described in the bought and sold notes as "S. & H. (crown) common bars." The iron when tendered was found to bear the mark of the new firm "H. & Co.," with a crown, and was rejected by the defendant. In an action for refusing to accept the iron, the jury found that the mark "S. & H." was not a material part of the bargain, and that the article tendered was substantially what the defendant bargained for:—Held, that, construing the contract by the surrounding circumstances, the mark S. & H. might, if necessary, be rejected as falsa demonstratio, and that the contract was complied with by the tender of iron marked "H. & Co." *Hopkins* v. *Hitchcock*, 65.

2. *Architect's certificate.*]—Under a builder's contract, certain instalments were to be paid as the work progressed, and the balance within two calendar months after the completion of the contract, "provided the architect should have *certified* that the whole of the work had been done to his satisfaction:"—Held, that it was not necessary that the architect should certify *in writing*. *Roberts* v. *Watkins*, 592.

CONTRIBUTION.

To Average Loss,—See SHIPPING, 1, 2.

COSTS.

Of preparing for Trial, where notice of Trial not given.

1. A plaintiff is not *in any case* entitled to the costs of preparing for trial,—such as instructions for brief, drawing and copying briefs and documents, and advising on evidence,—until after notice of trial; and that even though the defendant has obtained repeated orders for time to plead extending down to five or six days before the commission day of the assize, and is under terms to take short notice of trial or such notice as the plaintiff can give. *Freeman* v. *Springham*, 197.

Cause removed by Certiorari from the County-Court.

2. The 7th of the directions to the taxing masters, of Hilary Term, 1853, does not apply to an action commenced in a county-court, and removed by certiorari to a superior court. *Perry* v. *Bennett*, 402.

3. The plaintiff in such a case, therefore, is entitled to costs on the higher scale, though he recovers less than 20*l*. *Ib.*

Concurrent Jurisdiction.

4. The fact of one item in a tradesman's bill being separated from the rest by an interval of *several years*, does not prevent its operating (if accruing within the jurisdiction of the county-court within which the defendant dwells) to take the case out of the concurrent jurisdiction clause of the 9 & 10 Vict. c. 95. *Copeman* v. *Hart*, 731.

Under the 51st and 52d sections of the Lands Clauses Consolidation Act, 1845,—See RAILWAY COMPANY, 6–8.

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COUNTY-COURT.

Costs of Cause removed from, by Certiorari,—See COSTS, 4.

COVENANT.

Implied,—See AGREEMENT, 2.

CROWN.

Prerogative of,—See PETITION OF RIGHT.

CROWN GRANT.

Validity of.

In 1830, the plaintiff obtained from the Crown a grant in fee-simple of certain lands in the county of Chester. In 1853, the Birkenhead Docks commissioners obtained from the commissioners of woods and forests a conveyance of the same lands, upon which, under the sanction of various acts of parliament (to some of which the plaintiff was an assenting

CROWN GRANT.
Validity of (continued).
arty), the dock commissioners proceeded to construct docks and other public works. In 1855, all the rights and privileges of the Birkenhead Docks commissioners were by act of parliament transferred to and vested in the corporation of Liverpool, and, by subsequent acts of parliament, from the corporation to the Liverpool Dock commissioners, and ultimately to the defendants the Mersey Docks and Harbour Board:—Held, that the conveyance of 1853 could not divest the estate which had vested in the plaintiff under the grant of 1830; and that the subsequent acts of parliament created no statutable title either in the dock commissioners or in the defendants. *Vyner* v. *The Mersey Docks and Harbour Board*, 753.

CUSTOM,—See PROFIT A PRENDRE.

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A specially endorsed writ under the 25th section of the Common Law Procedure Act, 1852, was served upon the defendant on Friday, the 27th of March; consequently the eight days for entering an appearance expired on Friday, the 3d of April. That day being Good Friday,—Held, that the defendant was not bound to enter an appearance until the following Wednesday. *Mumford* v. *Hitchcocks*, 361.

ENGRAVINGS.
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EVIDENCE.
Secondary Evidence, where admissible.
1. To justify the reception of secondary evidence of an agreement, it was proved that A., in whose possession it was, on landing at New York, was arrested on suspicion of being the bearer of secessionist despatches, and deprived of all his papers (amongst which was the agreement in question, which had reference to shipments in this country of goods intended to run the blockade at Charleston); that all were subsequently restored to him except the agreement; and that, on his making inquiry for it of the agents of the federal government at New York, he was told that it had been sent to Washington, the seat of government:—Held, that it was sufficiently shown that reasonable efforts had been made to procure the original agreement, and that therefore a copy was properly received in evidence. *Quilter* v. *Jones*, 747.
Mandamus for Examination of Witnesses in the Colonies.
2. A mandamus will not in general be granted for the examination of witnesses in one of the British colonies, where the same end may be attained by the less expensive and less dilatory proceeding by commission. *Farnworth* v. *Hyde*, 719

EXCURSION TRAINS,—See RAILWAY COMPANY, 2, 3.

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FISHERY,—See SALMON FISHERY.

FRAUDULENT CONCEALMENT,—See SURETY.

GAME.
Trespass in pursuit of, under 1 & 2 W. 4, c. 32.
1. Firing at game from a highway is a trespass in pursuit of game within the 1 & 2 W. 4, c. 32. *Mayhew*, app., *Wardley*, resp., 550.
2. And, where two persons are jointly engaged in the unlawful act, they may be severally convicted thereof. *Ib.*

GENTLEMAN,—See BILL OF SALE.

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HORSE EXERCISE,—See INFANT, 1, 2.

HUSBAND AND WIFE.
Liability of Husband for Necessaries supplied to the Wife.
Where a husband by his cruelty compels his wife to live apart from him, he is liable upon contracts made by her for necessaries, notwithstanding she in fact receives from him an allowance which is found by the jury to be insufficient, regard being had to his means and position in life. *Baker* v. *Sampson*, 383.

IMPLIED COVENANT,—See AGREEMENT, 2.

INFANT.
Liability for Necessaries.
1. An infant,—a Cambridge under-graduate,—hired a mare for a ride along the road, being expressly told that she was not fit for leaping. The mare was put to a fence, and in taking it fell upon a stake and was so injured that she died:—Held, that the infant was guilty of an actionable wrong, and therefore liable irrespective of the question of necessaries. *Burnard*, app., *Haggis*, resp., 45.
2. Whether horse-exercise is per se a necessary for an infant in that position,—*quære*. *Ib.*
3. The nature and extent of the liability of an infant or a married woman cannot be changed by suing ex delicto in respect of a claim arising on a contract: per Byles, J. *Ib.*
Personal Responsibility of, for a Criminal Act.
4. An infant under the age of seven years cannot incur the guilt of felony. *Marsh* v. *Loader*, 535.
5. The defendant caught a child in the act of stealing a piece of wood from his premises, and gave him into custody. The child was discharged by the magistrate on the ground that he was under the age of responsibility; and he afterwards by his next friend brought an action against the defendant for false imprisonment:—Held, that a plea of felony was no answer to the action; and, the jury having given him 20*l.* damages, the court declined to interfere on the ground of excess. *Ib.*

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INSURANCE.
Delivery of Policy.
1. One L., an insurance-broker, as agent for the plaintiffs, gave instructions for a policy of 2000*l.* on the ship Leonidas belonging to the plaintiffs, to be prepared by the defendants, an incorporated insurance company. Before the policy was ready, the plaintiffs changed their minds, and directed L. to effect a policy for 1000*l.* instead of 2000*l.*, and upon somewhat different terms. L. accordingly delivered a second slip to the company, pursuant to the last instructions, and was debited by them with the premium in the usual way, the amount of which he afterwards received from the plaintiffs. A policy for 1000*l.* was thereupon, pursuant to the practice of insurance companies, filled up by the company and duly executed and sealed by two directors, and retained by the company until called for by the assured or their broker. On the premium becoming due from L. to the company, a debit-note was handed to one of L.'s clerks, with a demand of payment; whereupon the clerk said that it was a mistake, and that the insurance on the Leonidas had been cancelled. A second messenger was sent from the company's office, with the policy executed, to show that such an insurance had been effected; but L.'s clerk persisting that it had been done in mistake, the messenger took back the policy; and on the same day L.'s clerk called at the office of the company, and requested that the policy might be cancelled, and thereupon the following memorandum was endorsed upon it and signed by the two directors,—"Settled a return of the whole premium on the within policy, and cancelled this insurance, no risk attaching thereto." The Leonidas being afterwards lost, the plaintiffs repudiated the cancellation of the policy, which it was admitted was done without their knowledge and consent, and brought an action on the policy:—Held, in the Exchequer Chamber, by Pollock, C. B., Martin, B., Bramwell, B., and Channell, B.,—affirming the judgment of the court below,—that there had never been any delivery of the policy by the company so as to constitute a complete contract between them and the plaintiffs,—Blackburn, J., and Mellor, J., dissenting. *Xenos* v. *Wickham*, 435.

INSURANCE.

[*Broker—"Signed, sealed, and delivered"—Retaining possession of Deed.*

1*. A policy of insurance purported to be "signed, sealed, and delivered" by two of the directors of an insurance company in the presence of their secretary, and according to the powers vested in the directors by the deed of settlement of the company. This statement was taken, as against the company, to be conclusive that it was not only duly signed and sealed, but also duly delivered. A policy "signed, sealed, and delivered," is complete and binding as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it. It is not necessary that the assured should formally accept or take away a policy in order to make the delivery complete. After the broker had prepared a slip, and the proposed insurer had accepted it, and had prepared a policy in accordance with it, a desire was expressed by him, and assented to by the underwriter, that the policy should be cancelled, on which a cancellation was in form effected:—Held, that this was not effectual as to the assured, who had not, in fact, given the broker any authority to cancel the policy. Per LORD CRANWORTH:—It is no part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into. A., a broker, was instructed to effect for B., a shipowner, an insurance on a ship. A. gave a slip to C. (the authorized representative of an insurance company), which was accepted, and a policy prepared accordingly. When the policy (with the account debiting A. with the premium) was sent to A.'s office, "duly signed, sealed, and delivered," his clerk said there had been a mistake, that the policy ought not to have gone forward, and that there was no premium due. This was repeated by another clerk of A., who came to C.'s office for that purpose, and requested the cancellation of the policy. C. acted on these representations (which, however, had been made by A.'s clerks without any authority from B., the shipowner), and cancelled the policy, but charged A. with the stamp duty paid, and gave the policy to A. to enable him, if possible, to get a return of the stamp duty on it. The ship was lost, and B. made his claim for the loss:—Held, that the circumstances were sufficient to show an execution and delivery of the policy, and that the unauthorized act of A. afforded no answer to the claim. *Xenos* v. *Wickham*, H. of L., 861.]

On Ship warranted "free from Capture, &c., and from all Consequences of Hostilities," &c.

2. Goods consisting of 6500 bags of coffee, valued at 25,000*l.*, on board the ship Linwood, were insured on a voyage from Rio de Janeiro to New Orleans, and thence to New York; the policy containing the following warranty,—"Warranted free from capture, seizure, and detention, and all the consequences thereof or of any attempt thereat, and *free from all consequences of hostilities*, riots, or commotions." At the time of the ship's departure from Rio, the Northern States of America (called "federals") were at war with the Southern States (called "confederates"). The ship was a federal ship: the cargo the property of neutrals. On his voyage from New Orleans to New York, the master of the Linwood, being out of his reckoning, and supposing that he had passed Cape Hatteras, a dangerous headland on the coast of North Carolina, instead of keeping his course N. N. E., changed it to W., and consequently went on shore about ten miles south of the Cape, without any possibility of getting off again. It appeared that until recently a light had always been kept burning at Cape Hatteras, which in ordinary weather was visible at a distance of from 20 to 30 miles; but that, North Carolina being at this time in the possession of the confederates, they had extinguished the light for the purpose of harassing the federal shipping. The Linwood being thus on shore a short distance from the land, the confederate officers came off to her and took the captain and his papers on shore, and detained him and ultimately the rest of the crew on shore as prisoners. The wreck took place on the 17th of July. On the 18th, the weather was rough, and nothing could be done. But, on the 19th, certain persons called "wreckers" or "salvors" (officers appointed by the federal government for that purpose) came down and got 150 bags of coffee on shore (apparently) undamaged: and it was proved that they might have got on shore 1000 more, but for the interference of the confederate troops, who wanted to obtain the cargo for themselves. On the 20th, the weather becoming again boisterous, the ship broke up, and all the cargo on board was lost:—Held, that, under these circumstances, the insurers were liable as for a partial loss in respect of the coffee which remained on board incapable of being saved,—the *proximate* cause of the loss being a peril of the sea, and not the hostile act of the confederate troops in extinguishing the light; but that, as to much of the cargo as was actually saved, and as to that which would have been saved but for the interference of the troops, this was a loss by a "consequence of hostilities" within the warranty, and for this the insurers were not liable. *Ionides* v. *The Universal Marine Insurance Company*, 259.

INTERROGATORIES,—See PRACTICE, 2, 3.

JOINT STOCK COMPANY.

Scire facias against a Shareholder.

1. The court will not grant a rule (under the 8 & 9 Vict. c. 16, s. 36) for a scire facias against a party as a shareholder in a joint-stock company, upon a judgment obtained against the company, unless the affidavits disclose reasonable grounds for believing that the party sought to be charged is a shareholder. The fact of his having applied for and received an allotment of shares, and paid a deposit thereon, is not enough. *Edwards* v. *The Kilkenny and Great Southern and Western Railway Company*, 526.

2. The court will not allow a sci. fa. to go against one as a shareholder in a joint-stock company unless reasonably satisfied that he actually *is* a shareholder. *Mather* v. *The National Assurance and Investment Association,—Re Henry Clark*, 676.

3. *Quære*, whether a sci. fa. can be granted to one who from the constitution of the association is a partner therein. *Ib.*

LACHES,—See BILL OF EXCHANGE, 1.

LANDLORD AND TENANT.

Subject of Demise.

1. The owner of a factory consisting of several rooms was in the habit of letting "standings" therein for lace-machines, himself supplying the power for working them, there being no demise of the room:—Held, that the weekly payments could not be distrained for as "rent." *Hancock* v. *Austin*, 634.

Entry to Distrain.

2. An entry for the purpose of making a distress through a window which is fastened by means of a hasp, is not lawful. *Hancock* v. *Austin*, 634.

Construction of Agreement.

3. Held, that the following words in an agreement for letting do not create a *condition*, —"The said A. (the tenant) hereby agrees that he will not underlet the said premises without the consent in writing of the landlord." *Shaw* v. *Coffin*, 372.

And see METROPOLITAN BUILDING ACT.

LETTERS-PATENT.

What the subject of a Patent.

Tubular boilers for horticultural buildings had formerly been cast in several pieces,—a hollow ring with holes or sockets therein for the top and bottom, the sides being composed of vertical tubes cast separately, which were afterwards fastened into the sockets of the rings by means of iron cement. The plaintiff took out a patent for "an improvement in the manufacture of cast tubular boilers," which improvement (found by the jury to be a useful and beneficial one) consisted in casting the whole boiler in *one piece*:—Held by the Exchequer Chamber,—affirming the judgment of the court below,—that this was not the subject of a patent. *Ormson* v. *Clarke*, 475.

LIGHT.

Extinction of,—See INSURANCE, 2.

LIVERPOOL DOCK ACTS,—See CROWN GRANT.

LUGGAGE,—See RAILWAY COMPANY, 2, 3.

MALICIOUS ARREST.

On Process afterwards set aside.

Upon a change of solicitors in certain suits in equity, an order was made by the Master of the Rolls requiring the former solicitor to hand over to the newly-appointed solicitor all papers and documents in his possession, custody, or power relating to the suits. Some of the papers were in the hands of counsel, and others in the hands of a law-stationer, who respectively claimed liens thereon for their fees and charges; and the solicitor, alleging that his client had undertaken to provide funds for fees and disbursements, but had failed to do so, was consequently unable to comply with the order as to them. The newly-appointed solicitor, upon an affidavit alleging the neglect to obey the order, but not mentioning the excuse set up, obtained from the clerk of the records and writs a writ of attachment, under which the former solicitor (already in custody for debt) was detained. An application having been fruitlessly made to the Master of the Rolls to set aside the attachment, upon a statement of all the facts, the former solicitor appealed to the Lords Justices, who reversed the decision of the Master of the Rolls, with costs, and ordered the writ to be set aside, and the solicitor discharged from custody:—Held, that neither the solicitor who so sued out the attachment nor the client was liable in trespass. *Williams* v. *Smith*, 596.

MANDAMUS,—See EVIDENCE, 2.

MASTER.

Reference to, under the 52d section of the Lands Clauses Consolidation Act, 1845,—See RAILWAY COMPANY, 7, 8.

MASTER AND SERVANT.

Who are "Handicraftsmen or Artificers" within the 4 G. 4, c. 34, s. 3.

An iron-ship-builder contracted in writing with six skilled handicraftsmen to plate a vessel, they agreeing exclusively to serve him subject to the rules and regulations of the yard, and to execute the whole of the skilled and unskilled labour requisite to complete the entire hull of the vessel, of the best workmanship and to the entire satisfaction of their employer (they employing and paying such skilled and unskilled assistants as might be requisite to complete the vessel with all despatch), and to be paid 5*l.* per ton for the work so done by them:—Held, that the contracting parties were "handicraftsmen or artificers," within the meaning of the 4 G. 4, c. 34, s. 3. *Lawrence*, app., *Todd*, resp., 554.

MEDICAL PRACTITIONER.

Registration under 21 & 22 Vict. c. 98.

1. A medical practitioner is entitled to maintain an action for attendances and medicine, though not registered at the time of such attendance under the 21 & 22 Vict. c. 98: it is enough if he appears to be duly registered at the time of the trial. *Turner* v. *Reynall*, 328.

2. And, where a business is carried on by two partners, one of whom is registered as a surgeon and apothecary, and the other as a surgeon only, this is no answer to a joint claim for attendances and medicine supplied in both capacities. *Ib.*

Semble,—per Erle, C. J.,—that it would be enough if one member of the firm only had been registered. *Ib.*

MEMORANDUM.

Queen's Counsel.

George Stovin Venables, 434.

MERSEY DOCKS,—See CROWN GRANT.

METROPOLIS LOCAL MANAGEMENT ACT.

Right of Local Board to demolish Premises as to which due Notice not given under the Statute.

The 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, empowers the district board to alter or demolish a house, where the builder has neglected to give notice of his intention to build seven days before proceeding to lay or dig the foundation:—Held, that this does not empower them to demolish the building, without first giving the party guilty of the omission an opportunity of being heard; and that the 211th section, which gives an appeal to the Metropolitan board of works, does not prevent the builder or owner of the premises from suing them for so doing. *Cooper* v. *The Board of Works for the Wandsworth District*, 180.

METROPOLITAN BUILDING ACT.

Recovery by Tenant of Moneys for which his Landlord is liable as "Adjoining Owner."

A tenant who has been compelled by the "building owner" to pay the proportion of the expenses of a party-wall or structure which was payable under the Metropolitan Building Act, 1855, by his landlord, the "adjoining owner," may maintain an action against the latter to recover the sum so paid, and is not bound (though entitled) to deduct it from rent due or accruing due. *Earle* v. *Maugham*, 626.

MILL-DAM,—See SALMON FISHERY.

MINE,—See PARTNERSHIP.

MONEY HAD AND RECEIVED,—See RAILWAY COMPANY, 1.

NECESSARIES,—See HUSBAND AND WIFE. INFANT, 1–3.

NEGLIGENCE.

In towing a Vessel.

The plaintiffs' vessel, whilst being towed into a harbour by a steam-tug, got aground, and the defendants' vessel, which was being towed in at the same time by the same tug, astern of the plaintiffs' vessel, without any active default on the defendants' part, struck and damaged the plaintiffs' vessel:—Held, no evidence to go to a jury of negligence for which the defendants were liable. *Harris*, app., *Anderson*, resp., 499.

And See ATTORNEY, 2. RAILWAY COMPANY, 4.

NEW TRIAL.

Time for moving for,—See PRACTICE, 9.

PARTIAL LOSS,—See INSURANCE, 2.

PARTNERSHIP.

What constitutes a Partnership in a Mine.

The defendant advanced money to one G., who was engaged in getting up a company to work a mine in Cornwall, receiving as a security a deposit of 250 shares in the mine, with an option to take the shares in satisfaction pro tanto, such option to be declared within fourteen days. The defendant never did in terms declare his option to accept the shares: but he went down to the mine, made inquiries and obtained reports as to the condition and prospects of the mine and as to the cost of an engine to be used there, and on one occasion assisted in paying the miners' wages: he also permitted the captain of the mine, without contradiction, to represent him as a capitalist from London who had a large interest in the mine, and intended to work it vigorously. In an action by a person who had supplied goods to the mine upon the faith of representations by the captain that the mine was being worked by a person of substance whose name he was not authorized to give,—Held, that the above was evidence from which the jury were warranted in inferring that the defendant was a partner, although his name was never mentioned,—personal identification being sufficient. *Martyn* v. *Gray*, 824.

PASSENGERS' LUGGAGE,—See RAILWAY COMPANY, 2, 3.

PATENT,—See LETTERS-PATENT.

PETITION OF RIGHT.

Rights of the Crown as to Double Pleading, &c.

1. It is competent to the Crown (without leave) to plead and demur to a petition of right under the 23 & 24 Vict. c. 34,—there being nothing in that statute to take away the prerogative right of the Crown to plead double. *Tobin* v. *The Queen*, 505.

2. And the whole of the allegations in the petition may be put in issue by a general traverse,—though, *semble* that the court might interfere to prevent the suppliant from being prejudiced by an embarrassing plea. *Ib.*

PHOTOGRAPHY.

Piracy of Engravings, &c., by means of,—See PIRACY.

PIRACY.

Of Engravings by means of Photography.

The piracy of a picture or engraving by the process of photography, or by any other process mechanical or otherwise whereby copies may be indefinitely multiplied, is within the statutes (8 G. 2, c. 13, 7 G. 3, c. 38, and 17 G. 3, c. 57) for the protection of artists and engravers. *Gambart* v. *Ball*, 306.

PLEADING.

Pleas in Bar.

1. To an action by a ship-owner against a shipper of goods to recover his proportion of average loss, the defendant pleaded that his promise was subject to a condition, viz., that the ship was seaworthy at the commencement of the voyage, and that she was not then seaworthy:—Held, a bad plea. *Schloss* v. *Heriot*, 59.

2. He further pleaded, that there never was any express promise to the effect in the declaration mentioned; that the ship was unseaworthy at the commencement of the voyage; and that the average loss was occasioned and arose from and in consequence of such unseaworthiness:—Held, a good plea, inasmuch as it showed that the plaintiff's actionable negligence and misconduct produced the very damage for which he sought to recover contribution from the defendants; and (probably) also on the ground of avoidance of circuity of action. *Ib.*

In Petition of Right under 23 & 24 *Vict. c.* 34,—See PETITION OF RIGHT.

POACHING,—See GAME.

PRACTICE.

Easter Holidays.

1. A specially endorsed writ under the 25th section of the Common Law Procedure Act, 1852, was served upon the defendant on Friday, the 27th of March; consequently the eight days for entering an appearance expired on Friday, the 3d of April. That day being Good Friday,—Held, that the defendant was not bound to enter an appearance until the following Wednesday. *Mumford* v. *Hitchcocke*, 361.

Interrogatories under 17 & 18 *Vict. c.* 125, *s.* 51.

2. *In ejectment.*]—A defendant in ejectment is not without showing special circumstances entitled to interrogate the plaintiff (under s. 51 of the Common Law Procedure Act, 1854),

PRACTICE.

Interrogatories under 17 & 18 *Vict. c.* 125, *s.* 51 (*continued*).

as to the nature of the title upon which he relies; but he will be allowed to do so where he has been long in possession, and is altogether ignorant of the nature of the case he is called upon to meet. *Stoate* v. *Rew*, 209.

3. *In slander.*]—In an action for slander, the court refused to allow the following interrogatories to be administered to the defendant,—

"1. Did you speak and publish the words laid in the declaration, or any and which of them, or any and what other words conveying the same or similar imputations against the plaintiff?

"2. When, where, and to whom did you speak and publish the words laid in the declaration?" *Stern* v. *Sevastopulo*, 737.

Production and Inspection of Documents.

4. Upon an application for discovery, under the 50th section of the Common Law Procedure Act, 1854, the affidavits should identify the documents of which discovery is sought: a mere vague suggestion that some documents exist, will not suffice. *Woolley* v. *Pole*, 538.

5. And, *quære* whether a defect in this respect can be aided by reliance upon the affidavits produced in answer to the motion? *Ib.*

6. In an action upon a fire-policy, the court made an order for the production of communications which passed between the company and their agent by whom the insurance was effected, and between the company and other offices who shared in the risk, relative to the existence and value of the property about to be insured. *Ib.*

7. But they refused to allow the plaintiff to inspect the reports and list of salvage made out for the company by their own officers. *Ib.*

Security for Costs.

8. It is no objection to a motion for security for costs on the ground that the plaintiff (a foreigner having a very shadowy residence in this country) has assigned his interest in the result of the action,—that the fact was known to the defendant more than a year ago, and that the cause is ripe for trial. *Zychlinski* v. *Maltby*, 322.

Time for moving for New Trial.

9. A suggestion of perjury on the part of the defendant and his witnesses, and that fresh evidence has been discovered by the plaintiff since the expiration of the time for moving for a new trial, affords no ground for asking the court to dispense with the 50th rule of Hilary Term, 1853. *Gambart* v. *Mayne*, 320.

Amendment of Rule to enter a Verdict.

10. Where, in an action upon an agreement the plaintiff obtained a verdict, and a rule was afterwards made absolute to enter a *verdict for the defendant*,—the court, under special circumstances, allowed the rule to be amended by directing a *nonsuit* to be entered, but only upon the terms of the plaintiff paying the costs of the former action and of the rule. *Sillen* v. *Holloway*, 336.

PRESCRIPTION,—See PROFIT A PRENDRE.

PRINCIPAL AND AGENT.

Agent's Right to Commission on Sale of Property.

1. An auctioneer and estate agent was employed to sell an estate, under an agreement by which he was to receive a commission of 2½ per cent. "if the estate should be sold," and, "in case the estate should not be sold," he was to be paid 25*l.* as a compensation for his trouble and expense. Having put up the estate to auction, and failed to sell it, the agent, being asked by a person who had attended the sale who was the owner of the property, referred him to his principal; and ultimately that person, without any further intervention of the agent, became the purchaser:—Held, that the sale having been effected through the means of the agent, he was entitled to the stipulated commission. *Green* v. *Bartlett*, 681.

How far Principal affected by Knowledge of the Agent.

2. A principal is (at law) affected with notice of all circumstances which come to the knowledge of his agent in the course of his employment as such; but not with knowledge acquired by him aliunde. *Dresser* v. *Norwood*, 574.

3. A. placed goods in the hands of H., a factor, for sale on a del credere commission. B. bought them through the agency of C., a broker, who had prior knowledge of the fact that they were the property of A., which knowledge, however, was not communicated to B., who purchased bonâ fide, although he knew that H. was in the habit of selling goods *as factor*:—Held, that B. not being affected by the knowledge of C., the broker was entitled to set off against the price of the goods so bought for him a debt due to him from H. *Ib.*

PRODUCTION OF DOCUMENTS,—See PRACTICE, 4–7.

PROFIT A PRENDRE.

In alieno solo.

To an action of trespass for breaking and entering certain land of the plaintiff, being part of the sea-shore between high and low-water mark in or adjoining the township of Owthorne, and taking gravel, stones, sand, &c.,—the defendant pleaded several pleas of justification, some setting up a right in the inhabitants of the township of Owthorne to take the gravel, &c., to be used for the cultivation and improvement of their land; others claiming it for the necessary repairs of the highways in the township; others setting up a prescriptive right under a thirty or sixty years' user respectively; and others claiming to exercise the right, as parish officer, for the repair of the highways:—Held, that the pleas were bad: for that, so far as they were capable of being construed as justifying under a custom, such custom would be void, being a claim of a profit a prendre in alieno solo, which can only exist by grant or prescription; and that, if the claim were founded on prescription, it would be equally bad, inasmuch as it was a claim by persons who, not being a corporation, were incapable of taking by grant, and not being claimed in a que estate. *Constable* v. *Nicholson*, 230.

PROMOTIONS,—See MEMORANDUM.

PROXIMATE CAUSE,—See INSURANCE, 2.

PUBLIC COMPANY,—See JOINT-STOCK COMPANY. RAILWAY COMPANY.

RAILWAY COMPANY.

Powers and Duties as Common Carriers of Goods.

1. *Equality of charge.*]—By the 7 & 8 Vict. c. iii. s. 50, the Great Western Railway Company are empowered, whenever they shall act as carriers, to charge for the carriage of goods, &c., such sums as they may think expedient, within the limits pointed out by their acts of incorporation, provided such charges are made to all persons equally; and s. 51 authorises them to enter into such arrangements as they may think fit, with reference, amongst other things, to the collection and delivery of goods. By a subsequent act, 10 & 11 Vict. c. ccxxvi. s. 53, the company are empowered to charge for small parcels "that is to say, parcels not exceeding 500 lbs. in weight," "any sum which they think fit:"—Held, upon the authority of Pickford v. The Grand Junction Railway Company, 10 M. & W. 399, Parker v. The Great Western Railway Company, 7 M. & G. 253, 7 Scott N. R. 835, and Baxendale v. The Great Western Railway Company, 5 C. B. N. S. 336,—dissentiente Erle, C. J.,—that the company are still bound to charge *equally*, and cannot lawfully demand for the carriage of parcels from station to station a sum which shall include the cost of collection and delivery, and so impose an unequal burthen on those who do not require the performance of this latter service at their hands; and that money had and received will lie to recover back sums demanded and received in excess. *Baxendale* v. *The Great Western Railway Company*, 1.

Excursion Trains.

2. The 39th section of the North-Eastern Railway Company's Act, 17 & 18 Vict. c. ccxi., enacts that "every passenger travelling upon the said railways may take with him his ordinary luggage, not exceeding 150 lbs. in weight for first-class passengers, and 100 lbs. in weight for second and third-class passengers, without any extra charge being made for the carriage thereof:"—Held, that this does not preclude the company from making special arrangements for the exclusion of luggage by cheap excursion trains. *Rumsey* v. *The North-Eastern Railway Company*, 641.

3. The plaintiff took an excursion-ticket for a journey from Scarborough to Whitby, for which he paid 5*s*., knowing that the company declined to carry any luggage for passengers travelling with excursion-tickets, and that, if he went (as he might have done by the same train) as an ordinary passenger, with luggage, the price of the ticket would be 9*s*. Before taking his ticket, the plaintiff had procured one of the company's porters to place his portmanteau in the luggage-van, not informing the porter how he was going to travel On arriving at Malton, an intermediate station, the plaintiff requested that his portmanteau might be taken out of the van, to await his return from Whitby, on his way to York. The guard, however, refused to allow this to be done, the portmanteau not being booked; and it was accordingly carried on to Whitby, where the company's servants refused to deliver it up without being paid for the carriage from Scarborough to Whitby:—Held, that the circumstances raised an implied contract for the carriage of the portmanteau for hire, and therefore that the company were justified in detaining it. *Ib.*

Action against, for Negligence.

4. Where a railway crosses a highway on a level at a place where there is considerable traffic,—Held, that the fact of the engine-driver blowing off the steam from the mud-cocks at that spot, so as to frighten horses waiting to pass over the line, was sufficient to warrant

RAILWAY COMPANY.
Action against, for Negligence (continued).
the conclusion that the company had been guilty of actionable negligence. *The Manchester South Junction and Altrincham Railway Company*, app., *Fullarton*, resp., 54.
Seisure for Tolls.
5. By the 166th section of the South Western Railway Act, 4 & 5 W. 4, c. lxxxviii., the tolls authorised by the act were to be paid to such persons, at such places upon or near the railway, and in such manner as the directors should, by notice to be annexed to the list of tolls, appoint; and, in case of refusal or neglect, *on demand*, to pay such tolls, *the person to whom the tolls ought to have been paid* is empowered to seise the goods for or in respect of which such tolls ought to have been paid, or any other goods belonging to the party which shall pass on or along the railway, and detain the same until payment of the tolls and charges; and, if the goods are not redeemed within five days, the same shall be *appraised* and sold, and such tolls and charges satisfied thereout, as the law directs in cases of distress for rent:—Held, that, where the company seized and sold without complying with these several conditions,—no demand of the tolls having been made, and the seizure not having been made by "the person to whom the tolls ought to have been paid," and the sale having taken place without an appraisement,—they became trespassers *ab initio*. *North* v. *The London and South Western Railway Company*, 132.
Costs of Proceedings under the 68th section of the Lands Clauses Consolidation Act, 1845.
6. Where a claim is made, under the 68th section of the Lands Clauses Consolidation Act, 1845, for compensation in respect of "*lands injuriously affected*" by the execution of the works of a railway company, and the claimant elects to have the amount of compensation settled by a jury, and gives notice to that effect, and the company issue their warrant to the sheriff to summon a jury,—although, it seems, they are not bound to give the claimant the ten days' notice (accompanied by an offer of compensation for *lands taken*) of their intention to cause a jury to be summoned, under s. 38,—yet, to disentitle the claimant to costs, under s. 51, on the ground that the verdict of the jury is given for the same or a less sum than the sum *previously offered* by the company, such offer must be made before (or, possibly at the time) the company give the claimant notice of the time and place of the inquiry, under s. 46. *The Metropolitan Railway Company*, app., *Turnham*, resp., 212.
7. *Semble*, that, where a matter is by an act of parliament referred to a Master of one of the superior courts, in the absence of an express provision to the contrary, it is so referred subject to the ordinary control of the court of which he is an officer. *Ib.*
8. Therefore the decision of the Master of the Court of Queen's Bench, either as to liability or the amount of the costs payable by the undertakers under the 52d section of the Lands Clauses Consolidation Act, 1845, is subject to review by that court; but binding and conclusive unless so appealed against. *Ib.*
Form and Effect of an Award under the Lands Clauses Consolidation Act, 1845, *and how enforced.*
9. The award of arbitrators or an umpire upon a claim for compensation for lands injuriously affected by the works of a company, under the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), like the assessment of a compensation jury, merely ascertains the amount, not the claimant's right to compensation. *In re Newbold and the Metropolitan Railway Company*, 405.
10. Such an award, therefore, cannot be enforced by motion, like an ordinary award. *Ib.*
11. And, *semble*, that it is not competent to the arbitrators or umpire to state facts for the opinion of the court as upon a special case. *Ib.*

RELEASE,—See BANKRUPT, 3.
Stamp on,—See STAMP, 1.

ROAD,—See WAY.

SALE BY AUCTION,—See AUCTION.

SALE OF GOODS.
Appropriation.
1. A sale of a given number of bales out of a larger number does not vest the property in the vendee, until there has been a specific appropriation by the vendor assented to by the vendee or his agent. *Campbell* v. *The Mersey Docks and Harbour Board*, 412.
2. A. bought 250 bales of cotton, part of a cargo of 500 (of one mark) landed and warehoused in the Mersey Docks. On landing, the bales were sampled and numbered, and a warrant was handed by the company to A. for 250 bales "numbered from 1 to 250," as having been entered for him:—Held, that, assuming this to have been an appropriation of the specific bales to A., there having been no assent by him to such appropriation, express or implied, no property passed to him. *Ib.*

SALMON FISHERY.

Construction of the "Salmon Fishery Act, 1861."

1. *Fishing mill-dam.*]—A "fishing mill-dam" is a "fishery" within the meaning of the 20th section of "The Salmon Fishery Act, 1861," 24 & 25 Vict. c. 109. *Hodgson*, app., *Little*, resp., 111.

2. The proprietor or occupier of a "fishing mill-dam" on a salmon river is bound during the close season to remove all obstructions to the free passage of fish up the stream, even though he has ceased to use the dam for the purpose of fishing. *Ib.*

SCIRE FACIAS,—See JOINT-STOCK COMPANY.

SEA-SHORE RIGHTS,—See PROFIT A PRENDRE.

SEA-WORTHINESS,—See SHIPPING, 2, 3.

SECONDARY EVIDENCE,—See EVIDENCE, 1.

SECURITY FOR COSTS,—See PRACTICE, 8.

SERVANT,—See MASTER AND SERVANT.

SHERIFF.

Fees and Expenses.

The sheriff having seized under a fi. fa., notice was given of a prior act of bankruptcy by the debtor, and a petition was filed under which he was adjudicated bankrupt, the goods remaining unsold, and the messenger took possession of them:—Held, that the sheriff was not entitled to a rule calling upon the assignees to pay him the expenses of preparing for a sale of the goods. *Searle* v. *Blaise*, 856.

SHIPPING.

Average Loss.

1. To an action by a ship-owner against a shipper of goods to recover his proportion of average loss, the defendant pleaded that his promise was subject to a condition, viz., that the ship was seaworthy at the commencement of the voyage, and that she was not then seaworthy:—Held, a bad plea. *Schloss* v. *Heriot*, 59.

2. He further pleaded, that there never was any express promise to the effect in the declaration mentioned; that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned and arose from and in consequence of such unseaworthiness:—Held, a good plea, inasmuch as it showed that the plaintiff's actionable negligence and misconduct produced the very damage for which he sought to recover contribution from the defendants; and (probably) also on the ground of avoidance of circuity of action. *Ib.*

Right of Shipper to demand Goods, the Vessel being damaged.

3. A ship bound for Havana, laden with a general cargo under a charter-party at a lump-freight, left Liverpool on the 1st of August. On the 7th she ran upon the Blackwater bank on the Irish coast, and sustained serious damage, and was ultimately got into Arklow, where part of the cargo was landed, the rest having been transhipped and taken to Liverpool. Rice, which represented a third of the freight, was found to be so damaged as to be admittedly incapable of being taken on. All the rest of the cargo (except an inconsiderable portion) was damaged to such an extent that in the opinion of competent witnesses it could not have been carried to its destination in a merchantable condition, and in fact would have been almost worthless. Whilst the vessel with the goods were at Arklow, S., one of the charterers, went over to represent the interests of the shippers; and the master gave him a written authority to "act on behalf of the owners (of the ship) to the best of his judgment and ability." S., conceiving from the condition of the goods that they could not profitably be carried to Havana, or at all without much delay and expense, ordered the goods to be sold. The sale took place on the 12th of September. In the meantime the captain proceeded to Dublin to repair the vessel; the repairs (which cost 2300*l.*) were commenced in September, and were finished by the following February, when the ship proceeded to Cardiff, and there obtained a charter less remunerative than that in question. In an action by the master claiming damages for wrongfully preventing him from carrying the goods on to the Havana and earning freight, the learned judge told the jury, in substance, that the defendants were justified in what they did, provided it was the reasonable course to take, having regard to the interests of all parties. The jury having found for the plaintiff,—Held, that the question was properly left to them, and their finding warranted by the evidence. *Blasco* v. *Fletcher*, 147.

SLANDER.

Interrogatories in,—See PRACTICE, 3.

SMALL PARCELS,—See RAILWAY COMPANY, 1.

SOLICITOR,—See ATTORNEY.

SOUTHAMPTON DOCK COMPANY.

Tolls for landing Goods.

The Southampton Dock Company are empowered by their act, 6 W. 4, c. xxix., s. 149 to charge for the landing of goods in their docks the several sums mentioned in the schedule thereto annexed, and for articles not therein particularized such sums as shall be equal to the sums affixed on goods, &c., "of a similar nature, package, value, and quality," in the schedule. All the charges mentioned in the schedule were of small fixed sums,—none being ad valorem except the charge for "sculptured marble:"—Held, that the company were not entitled to make an ad valorem charge for the landing of goods not enumerated or at all approaching in "nature, value, and quality" to those enumerated in the schedule. *The Southampton Dock Company* v. *Hill*, 243.

STAMP.

On Deed of Release.

A release to the surviving partners in a firm by the executors of a deceased partner, of all the freehold, copyhold, and leasehold property held by the firm, expressing no consideration for the conveyance upon the face of it,—Held, to be sufficiently stamped with a common deed stamp. *Steer* v. *Crowley*, 337.

On Check drawn payable to "A. B. or order,"—See BILL OF EXCHANGE, 2.

SURETY.

Discharged by Concealment of Material Facts.

One P. had been employed by the plaintiffs in the sale of coals for them on commission, for which he at the end of each month gave them his acceptances, and by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. having fallen in arrear to the extent of 1272*l.*, the plaintiffs required him to find security to the amount of 300*l.*, and at his request the defendant consented to guarantee 100*l.* The agreement of guarantee recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties. In an action against the defendant on the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact:—Held, that the non-communication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them, was evidence for the jury in support of the plea. *Lee* v. *Jones*, 386.

SURGEON,—See MEDICAL PRACTITIONER.

SWANSEA HARBOUR.

Warranty of Depth of Water.

The trustees of a dock, being about to open a new one under the authority of parliament, issued a notice addressed to ship-owners, merchants, and others, describing the accommodation which their new dock would afford to shipping, and containing a statement that "the depth of water *on the dock sill* was 26 and 23 feet at the highest spring-tides, and 15 feet at the lowest neaps:"—Held, that this amounted to a warranty that there was an available depth of water *in the entrance channel* approximating that mentioned in the notice; and that the trustees were responsible to the owners of a ship, who, trusting to the representation contained in the notice, entered the dock to load, and were delayed and put to expense in consequence of the insufficiency of water in the channel to enable her to complete her loading in the dock. *Williams* v. *The Swansea Harbour Trustees*, 845.

TIVERTON ROADS ACT, 1861.

Construction of.

1. The Tiverton Roads Act, 1861 (24 Vict. c. xix.), comprises within the trusts eighteen several roads. The 11th section empowers the trustees to demand and take "at the several and respective toll-gates which shall be upon or on the sides of the said roads such tolls as the said trustees shall direct, not exceeding," amongst others, "for every horse drawing any cart, wagon, &c., with wheels of a less breadth than 4½ inches, the sum of *sixpence*;" and "for every horse or mule, laden or unladen, and not drawing, the sum of 1½*d.*" Section 13 enacts, that "*for passing and re-passing* any number of times on the same day with the same horses, beasts, or carriages liable to toll through *any* of the toll-gates to be continued or erected by virtue of this act upon any road hereinafter particularly mentioned, no more than the number of tolls hereinafter limited with reference to such road, shall be taken, that is to say,—*two* full tolls, and no more, upon the road from A. to B.; *two* full tolls, and no more, upon the road from C. to D.; *two* full tolls, and no more, upon the road from E. to F.; *one* full toll, and no more, upon *all* the other roads comprised in this act"

TIVERTON ROADS ACT, 1861.

Construction of (continued).

And the 14th section enacts, that "all horses, beasts, and cattle in respect whereof the tolls hereby authorized to be taken shall have been paid at any toll-gate on the said roads or on the sides thereof, shall, upon a ticket being produced denoting such payment, be permitted, in returning through the same toll-gate, *and in going and returning through such other toll-gate (if any) as the ticket for such payment shall free*, to pass toll-free at all times on the same day:—

Held, that the 13th section does not authorize the trustees to demand *two* full tolls from a traveller passing through only *one* gate on a line of road upon which *two* full tolls are chargeable. *James*, app., *Dickenson*, resp., *Williams*, app., *Wills*, resp., *Lovering*, app., *Limpany*, resp., 416.

2. Held also, that, where a party has paid *one* full toll on passing through a gate, he is not chargeable with *two* full tolls on passing on the same day through another gate on another of the roads on which *two* full tolls are demandable; but that he is liable to a second *single* toll,—there being nothing on the ticket to indicate that it frees any other gate. *Ib.*

3. Held also, that a traveller who has paid *one* full toll on passing through a gate on one of the roads on which *one* full toll is payable, is not entitled to pass toll-free on the same day through a gate on another of the roads upon which *one* full toll is payable,—the one full toll being by s. 13 payable upon "*each*" of the roads comprised in the act. *Ib.*

4. Held also, that the 11th section of the local act specifically providing for progressive charges in respect of the diminished breadth of wagon wheels, virtually repeals the 7th section of the General Turnpike Act, 3 G. 4, c. 126; and, consequently, that the toll is limited to the sums mentioned in the local act. *Ib.*

TOLL,—See RAILWAY COMPANY, 5. SOUTHAMPTON DOCK COMPANY. TIVERTON ROADS ACT, 1861. TURNPIKE.

TURNPIKE.

Toll.

1. Where the local act specifically provides for progressive charges in respect of the diminished breadth of wagon wheels, it virtually repeals the 7th section of the General Turnpike Act, 3 G. 4, c. 126; and consequently the toll is limited to the sums mentioned in the local act. *James*, app., *Dickenson*, resp., 416.

Toll for Beasts, &c., going to or from Pasture, &c.

2. The 1st section of the Turnpike Amendment Act, 1 & 2 W. 4, c. 25, enacts that "no toll shall be demanded or taken for any horse, sheep, or other beast or cattle going to or from water or pasture, &c., and passing on any turnpike-road, provided that such horse, &c., do not pass upon such turnpike-road more than the space of two miles in going to or returning from water or pasture." A., who carried on the business of a farmer and cattle-dealer, had two pasture-fields, one on each side of a toll-bar. Having purchased beasts and sheep at a market, he drove them to the one pasture, and, after keeping them there a day, drove them through the toll-bar to the other pasture, *intending the next day to send them to another market on that side of the bar, for sale.* The distance between the two pastures along the turnpike-road was less than two miles:—Held, that the animals were exempt from toll. *Warmby*, app., *Deakin*, resp., 124.

Demise of Tolls.

3. Trustees of a turnpike-road, under the 55th section of the General Turnpike Act, 3 G. 4, c. 126, put up tolls to farm subject to a condition that a month's rent be paid in advance, to be forfeited "if such taker shall refuse or neglect to execute the usual articles of agreement, with two sureties," by a given day, or "shall refuse or neglect to enter on the said tolls, or, having executed such agreement with sureties, and having entered upon the said tolls, shall not in all things fulfil and perform the covenants, &c., to be contained in such agreement." The defendant, who was the highest bidder, signed the following memorandum,—"I do hereby agree to take the tolls of, &c., at the sum of 411*l.*, and I do hereby agree on my part to fulfil the conditions for letting the tolls, and do hereby propose A. and B. as my sureties." This memorandum was signed by the defendant and by the clerk to the trustees (under s. 57), but not by the sureties. No other agreement was executed, and the defendant, though he paid the month's rent in advance, declined to enter upon the tolls:—Held, that the above memorandum constituted a valid demise of the tolls; the stipulation as to the sureties being a stipulation for the benefit of the trustees, which it was competent to them to waive. *Markham* v. *Stanford*, 376.

And see TIVERTON ROADS ACT, 1861.

TRADE-MARK,—See CONTRACT, 1.

UNSEAWORTHINESS,—See SHIPPING, 1, 2.

VENDOR AND PURCHASER.
Delivery of Abstract,—See AUCTION, 2.

WAIVER.
Of Stipulation for the Party's Benefit,—See TURNPIKE, 3.

WARRANTY,—See SWANSEA HARBOUR.

WAY.
Right to Soil of.

A. was possessed of a close the only way to which was along a green lane between two other closes, one of which belonged to A. and the other to B. In the absence of any direct evidence of ownership, the jury were told that they might presume the soil of the lane to belong in moieties to the owners of the adjoining closes, and that, in respect of the close at the end of the lane, A. had a mere easement:—Held, a proper direction. *Smith* v. *Hooden*, 398.

WEARING APPAREL.
Exception of,—See BANKRUPT 1.

WITNESSES.
Mandamus for Examination of, in the Colonies.

A mandamus will not in general be granted for the examination of witnesses in one of the British colonies, where the same end may be attained by the less expensive and less dilatory proceeding by commission. *Farnworth* v. *Hyde*, 719.

END OF VOL. XIV.

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